Paragon Systems, Inc. *and* National Association of Special Police and Security Officers. Case 05–CA–127523

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On September 30, 2015, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue in this case is whether the Respondent was a "perfectly clear" successor under *NLRB v. Burns Security Services,* 406 U.S. 272, 294–295 (1972), and *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), with an obligation to bargain with the Union prior to setting initial terms and conditions of employment that differed from those under the predecessor's collective-bargaining agreement with the Union. For the reasons discussed below, we find, contrary to the judge, that the General Counsel failed to prove that Paragon was a "perfectly clear" successor as alleged in the complaint. As a result, we find that Paragon did not violate Section 8(a)(5) and (1) by changing certain terms and conditions of employment when it began operations without giving the Union notice or the opportunity to bargain.

I. FACTS

Paragon provides armed security services to the Federal Government. In June 2013,[1] Paragon was awarded a contract to provide guard services at the Federal Emergency Management Agency (FEMA) building in Washington, D.C. Paragon was scheduled to take over operational control at the FEMA building effective September 1, replacing Knight Protective Services, which had an existing collective-bargaining agreement (CBA) with the Union covering protective security officers (PSOs).[2]

In mid-June, shortly after being awarded the contract, Paragon arranged for a memo to be posted at the FEMA building advising PSOs employed by Knight that Paragon had been awarded the contract and inviting PSOs to attend a job fair on June 29. The memo stated, "Paragon Systems is currently accepting applications from incumbent PSOs. To be considered for employment, all candidates must complete all parts of the Paragon application process." The memo also directed applicants to Paragon's website to complete an online application and notified applicants that they should bring the original and one copy of certain documents to the job fair, including a driver's license or state ID, social security card, birth certificate, and high school diploma, transcript, or GED certificate. The memo stated that offers of employment "are contingent upon successfully passing all pre-employment requirements, attending all scheduled training and passing all contract-required performance standards."

Paragon is subject to Executive Order 13495, "Non-Displacement of Qualified Workers" (E.O. 13495), which requires contractors with a Federal Government service contract to offer a right of first refusal to suitable employment to those nonmanagerial and nonsupervisory employees whose employment will be terminated as a result of the award of the successor contract. See 74 Fed.Reg. 6103 (2009).[3]

Paragon assumed operational control at the FEMA Building on September 1 and made the following changes to PSOs' terms and conditions of employment without notifying the Union: (1) PSOs no longer had the option of receiving health, welfare, and pension benefits as part of their wages; (2) PSOs no longer received a paid 30-minute break during each 8-hour shift; (3) the threshold for full-time employment status was changed from 32 to 40 hours per week; and (4) the uniform allowance was discontinued.

At some point after September 1, Paragon recognized the Union as the collective-bargaining representative for PSOs. Paragon and the Union agreed to a CBA in August 2014.

II. THE JUDGE'S DECISION

The judge agreed with the General Counsel's contention that Paragon's job fair memo was tantamount to an invitation to the Knight PSOs to accept employment with Paragon, and therefore that Paragon was a "perfectly clear" successor at the time that it posted the job fair memo in mid-June. Because the memo failed to announce that Paragon intended to establish new terms and conditions of

[1] All dates are in 2013 unless otherwise noted.

[2] The CBA's effective dates were October 1, 2012 through September 30, 2015.

[3] The Department of Labor's rules relating to administration of E.O. 13495 are codified at 29 CFR Sec. 9.1 et seq.

employment, the judge found that Paragon forfeited its right to set initial terms and conditions under the Board's *Spruce Up* analysis and that Paragon violated Section 8(a)(5) and (1) by unilaterally changing the terms and conditions of PSOs' employment when it took over operations in September.

III. POSITIONS OF THE PARTIES

Paragon excepts to the judge's findings and argues that it acted lawfully when it took over operations and set its own initial terms and conditions of employment. Paragon argues that the job fair memo simply informed PSOs that Paragon had been awarded the contract, was currently accepting applications from incumbent PSOs, and would be holding a job fair, but that the memo did not announce any intent to employ Knight PSOs and was not an invitation to Knight PSOs to accept employment.[4]

The General Counsel argues that the judge correctly found that Paragon invited Knight PSOs to accept employment with Paragon when it posted the job fair memo in mid-June and that Paragon was a "perfectly clear" successor at that time. The General Counsel does not argue in the alternative that, assuming Paragon did not become a "perfectly clear" successor until it distributed job offer letters to Knight PSOs at the June 29 job fair, the offer letters given to employees failed to clearly announce Paragon's intent to establish a new set of terms and conditions of employment and were insufficient to meet Paragon's obligations under *Spruce Up*, above. Nor did the General Counsel except to the judge's failure to find that, assuming Paragon was free to set initial terms and conditions, the alleged unlawful changes were not among its announced initial terms.[5]

For the reasons discussed below, we find merit to the Respondent's exceptions.

IV. DISCUSSION

Under *NLRB v. Burns Security Services*, supra, 406 U.S. at 281–295, a successor employer is not bound by the substantive terms of a collective-bargaining agreement negotiated by its predecessor and is ordinarily free to set initial terms and conditions of employment unilaterally. The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident whether the union will retain majority status in the new work force until after the successor has hired a full complement of employees. Id. at 295. The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Id. at 294–295.

In *Spruce Up Corp.*, supra, 209 NLRB 194, the Board interpreted the "perfectly clear" caveat in *Burns* as "restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Id. at 195 (fn. omitted).

A successor's obligation to bargain about initial terms of employment can arise prior to the successor's extension of formal offers of employment to the predecessor's employees or before the hiring process begins. A successor employer has an obligation to bargain over initial terms when it "displays an intent to employ the predecessor's employees without making it clear that their employment will be on different terms from those in place with the predecessor." *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 3 (2016). See also *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 2 fns. 7, 8 (2016) (bargaining obligation attached when successor informed employees that they would transfer to new business); *Canteen Co.,* 317 NLRB 1052, 1053 (1995) (bargaining obligation attached when successor expressed to union its desire to have employees serve a probationary period), enfd. 103 F.3d 1355 (7th Cir. 1997); *Fremont Ford*, 289 NLRB 1290, 1296–1297 (1988) (obligation attached when successor indicated to union that it had doubts about the retention of only a few employees); *Henry M. Hald High School Assn*., 213 NLRB 415 (1974) (obligation attached when successor gave assurances to employees that it would employ them).

Contrary to the judge, we find that Paragon did not display an intent to retain Knight PSOs when it posted the job fair memo. On its face, the memo does not state that PSOs who complete the application or attend the job fair will be offered employment. Instead, the memo states that Paragon is "currently accepting applications" and that all candidates must complete all parts of the application process "[t]o be considered for employment." The memo does not suggest that hiring is inevitable, and we find that the memo

[4] Paragon also excepts to the judge's finding that the complaint is not barred by Sec. 10(b). We affirm the judge's finding, for the reasons he gave. We do not rely, however, on the judge's statement that the Union exercised reasonable diligence "given the Union's resources." We find that the Union exercised reasonable diligence regardless of its resources.

[5] The General Counsel did, however, except to the judge's failure to recommend that the Board overrule *Spruce Up*. We decline to rule on the General Counsel's request in this case.

was simply an invitation to Knight PSOs to complete an application. The memo did not express Paragon's intent to hire Knight PSOs and was not an invitation to PSOs to accept employment with Paragon. Nor is there any evidence in the record of other communications by the Respondent indicating an intent to hire the Knight PSOs. Compare *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 10 (2007) (successor expressed intent to hire predecessor's employees when it asked employees to complete applications and W-4 forms "to update [successor's] records") .

We further find that Paragon's obligation under E.O. 13495 to offer Knight PSOs the right of first refusal does not warrant a contrary result in the circumstances presented here. The job fair memo makes no reference to the Executive Order or PSOs' right of first refusal, and it cannot be viewed as offering PSOs the right of first refusal. Moreover, there is no evidence that Knight PSOs had been through a transition from one contractor to another before or otherwise knew of Paragon's legal obligation. As a result, there is no evidence indicating that PSOs would expect that completing an application and/or attending the job fair would lead to continued employment such that they would interpret the job fair memo as an actual offer of employment and therefore be misled into believing that Paragon was offering them employment with unchanged terms and conditions. See *Data Monitor Systems, Inc.*, 364 NLRB No. 4, slip op. at 4 (2016). Compare *Adams &Associates, Inc.*, 363 NLRB No. 193, slip op. at 4 (2016) (finding successor subject to E.O. 13495 was a "perfectly clear" one based on its communications to the predecessor's employees).

Because we find that Paragon did not demonstrate its intent to retain Knight PSOs by posting the job fair memo in mid-June, we reverse the judge and find that the General Counsel has failed to prove that Paragon was a "perfectly clear" successor at that time. As a result, we dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Chad M. Horton, Esq., for the general Counsel.
Thomas P. Dowd, Esq., of Washington, D.C., for the Respondent.
Chalfrantz Perry, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Washington, D.C. on February 19, 2015. The National Association of Special Police and Security Officers (the Union) filed the charge on April 24, 2014, and the first amended charge on May 20, 2014, against Paragon Systems, Inc., (Paragon or Respondent).[1] The General Counsel issued the complaint on November 26, 2014, alleging Paragon violated Section 8(a)(5) and (1) of the Act by, without notice to and affording the Union the opportunity to bargain, making changes in the following terms of employment of employees represented by the Union: (a) Reduced and/or cancelled employee breaks; (b) Redefined the threshold for full-time employment status from 32 to 40 hours per week; (c) Discontinued a uniform allowance; (d) Discontinued the option of paying health and welfare benefits directly to employees' paychecks; and (e) Discontinued the option of paying pension benefits directly to employees' paychecks.

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs filed by the General Counsel and Paragon, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Paragon, a corporation, with an office and place of business in Herndon, Virginia (Respondent's facility) has been engaged in the business of providing security services to commercial and governmental entities, including the Federal Emergency Management Agency (FEMA), at 500 C Street, SW and 1201 Maryland Avenue, SW, in Washington D.C. Annually, Paragon performed services in excess of $50,000 in states other than the District of Columbia. Paragon admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

[1] All dates are 2013 unless otherwise indicated. Respondent's unopposed motion to correct the transcript; and the parties "Joint Motion to Withdraw the General Counsel's Argument That Respondent Unilaterally Changed Employee Breaks After September 1, 2013" are granted.

[2] In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.,* 179 F. 2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951). All testimony and evidence has been considered. If certain testimony or evidence is not mentioned it is because it is cumulative of the credited evidence, not credited, or not essential to the findings herein.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Federal Protective Service (FPS) is a division of the Department of Homeland Security, and is responsible for overseeing and providing security of various Federal buildings and facilities.[3] In June 2013, the FPS awarded Paragon a Federal contract to provide guard services at various federal buildings in the District of Columbia, including the FEMA building in Washington, D.C. Under the contract, Paragon was scheduled to take over operational control of guard services at FEMA building effective September 1 replacing Knight Protective Services, Inc. (Knight). The Union was the certified bargaining representative for the protective service officers (PSOs) who worked for Knight at the FEMA Building and the Union had a collective-bargaining agreement with Knight effective for October 1, 2012 through September 30, 2015 (the Knight CBA). As a Federal contractor with a government service contract, Paragon was subject to the requirements of Executive Order 13495, Non-Displacement of Qualified Workers as well as the McNamara-O'Hara Service Contract Act, 41 U.S.C. §§ 351–358.[4]

Shortly after the FEMA Federal contract was awarded to Paragon, Paragon arranged for a memorandum to be posted at the FEMA Building for incumbent Knight PSOs advising them Paragon was awarded the contract to begin providing guard services effective September 1, and inviting the incumbent PSOs to attend a job fair on June 29 at the Marriott hotel in Greenbelt, Maryland. The memorandum included the following:

> Paragon Systems is currently accepting applications from incumbent security officers. To be considered for employment, all candidates must complete all parts of the Paragon applications process.
>
> Applicants shall go to (listed website) or the company website (listed website) under careers and complete an online application.

The memorandum stated applicants must bring the following documents (the original and a copy) to the job fair. The documents listed included a driver's license or state ID, social security card, birth certificate, and high school diploma, transcript or GED certificate. The memo stated:

> Offers of employment are contingent upon successfully passing all pre-employment requirements, attending all scheduled training and passing all contract-required performance standards. A Medical exam, including a Fit Test and a drug screen is also required.
>
> Applicants will also be asked to provide availability times in order for the medical exam and the fit test to be scheduled.

The offer letter distributed to Knight employees on June 29 was dated June 29, and had each individual employee's name on it. It stated it was regarding "potential" employment with Paragon as a security officer. The letter stated, "On behalf of Paragon Systems, I would like to extend to you a contingent offer of employment to serve as a Security Officer . . ." "Effective date of this offer is September 1, 2013." The offer contained an appendix which included a wage rate and chart listing certain benefits. The offer letter discussed health/medical coverage and stated that if the employee elected not to receive health/medical coverage, then the health and welfare hourly rate indicated in the appendix assigned to their geographic area will automatically be contributed into a Company-sponsored 401(k) retirement plan, pretax, for the employee's benefit. The offer letter stated "You will not have the option of receiving a cash payment in lieu of health and retirement benefits." The offer letter stated:

> Shift schedules will be determined in accordance with the operational needs of the contract, with consideration given to employee seniority. Breaks will be provided in accordance with Company policy and in compliance with any applicable State and Federal law requirements and subject to the operational needs of the contract.
>
> All full-time employees who have continuously been employed by the Company, or its predecessors to the contract between the Company and the Department of Homeland (EG.29 CFR 4.173), shall be entitled to vacation pay in accordance with Appendix A.
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> . . .
>
> Paid holidays and sick leave are also available in accordance with Appendix A, and in accordance with certain eligibility requirements.
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> Additionally, to the extent indicated in Appendix A, individuals working in specific localities will receive an hourly pension earning for each regular hour worked that will be contributed on your behalf to the Company-sponsored retirement plan, pretax. You will have your own account within the 401(k) plan, and the money that you are entitled to receive will be placed in that account.
>
> Employment is contingent upon successfully passing all pre-employment requirements (including pre-employment interviews), attending all scheduled training, weapons qualification, and passing all contract-required performance standards including the physical exam with a physical abilities test. A pre-employment drug screen is also required.
>
> Your employment will be at will, meaning that there is no restriction on your ability to leave your employment at

[3] The findings here are made relying on a written stipulation of facts entered by the parties, credited testimony and documentary evidence submitted at the hearing.

[4] Executive Order 13495, states: "The Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover work force minimizes disruption in the delivery of services during a period of transition between contractors and provides the Federal Government the benefit of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements." Executive Order 13495, therefore, generally requires that successor service contractors performing on Federal contracts offer a right of first refusal to suitable employment under the contract to those employees (other than managerial and supervisory employees) under the predecessor contract whose employment will be terminated as a result of the award of the successor contract.

> any time or for any reason, and there is similarly no restriction on the Company's ability to terminate employment at any time and for any reason not prohibited by law.
>
> . . .
>
> In compliance with Executive Order 13495 (Non-Displacement of Qualified Workers under Service Contracts), you are hereby given a first right of refusal for this job opening. If you intend to accept employment you will need to hand deliver, or fax a copy of your acceptance form to (number provided) or mailed to the above address by July 6, 2013.
>
> Additionally, a copy of Paragon Systems' Health, Dental, and 401(k) Plan Summary Descriptions can be requested by calling Human Resources. . . .

The June 29 contingent offer letter contained a base pay rate of $24.29, a health and welfare rate of $5; and a pension rate of $1.11 for the 500 C Street location; 1201 Maryland Avenue Locations. However, the Knight CBA provided in its appendix that for a guard, the rate was $24.29, but effective October 31, 2012, the guard rate was increased to $26.80. The Knight CBA provided for four classifications with the lowest pay as of October 31, 2012 being $24.30, and the highest rate being $28.60. The Knight CBA provided for wage increases for all four classifications effective October 31, 2013. The Knight CBA provided effective October 31, 2012, the Employer health and welfare contribution was to be $6 per hour and pension contribution was to be $1.19 per hour, with the rate prior to that time being $5 and $1.11 per hour respectively. Thus, the June 29 offer letter understated wages, health and welfare, and pension benefits concerning the amounts the bargaining unit employees were receiving from Knight at the time the offer letter was distributed. The Knight CBA granted sick leave and vacation based on a formula accruing minutes per hours worked. It did not distinguish sick leave based on full or part time status. The Paragon offer letter offered vacation based a formula for hours for years of service, and just stated 6 sick days. It stated full-time employees will be entitled to vacation as listed in the appendix to the letter, but it did not define who was a full-time employee. The offer letter stated paid holidays and sick leave are also available in accord with the appendix based on certain unspecified eligibility requirements.

Paragon subsequently held a mandatory new hire orientation meeting on August 24, for employees who had been hired to fill PSO positions at the FEMA Building. At this meeting, PSOs were given copies of Paragon's Security Officer Handbook as well as followup information about PSO work schedules and break schedules based on the operational needs of the Federal contract. The Paragon Security Officer Handbook is over 50 pages in length singled spaced. It contains a table of contents, which does not specifically mention full-time status, breaks, vacation, or uniforms. At page 24 of the handbook it discusses uniforms and appearance. Within that provision, it discusses "wash and wear" uniforms and their maintenance. It states "If you are issued a uniform that requires dry cleaning, the local contract office will make arrangements to either provide clean uniforms to you, or reimburse you for dry cleaning expenses." At page 39, of the handbook under the heading "Definitions", it states, "A full-time employee regularly works a minimum of 40 or more hours per week on a continuing basis and has completed the introductory period." At page 41, there is a heading "On-Duty Meal Period". It states therein after defining on duty meals as involving posts that do not allow officers to leave the job site for meal periods, that "you will be paid on-duty meal periods you take." It states, "as some assignments, officers take off-duty, unpaid meal periods. If you take an unpaid meal period, you will be relieved of duties during that period." At page 47, the handbook states, "Eligible employees will be paid vacation pay in accordance with the terms of the Paragon vacation pay policy, applicable CBA or Wage Determination and applicable state and federal law." It states, "Paragon does not pay for sick days unless stipulated in the CBA." The employees attending the August 24 orientation signed for receipt of the handbook.

The parties stipulated to the following:

> Article VII of the Knight CBA set forth employee break structure, and provides, in relevant part: (a) employees working more than four (4) hours but less than eight (8) hours shall receive one (1) paid 15-minute break; (b) employees working eight (8) hours but less than 12 hours shall receive one (1) paid 30-minute break and two (2) paid 15-minute breaks; and (c) employees working 12 or more hours shall receive one (1) paid 30-minute break and three (3) paid 15-minute breaks. Effective September 1, 2013, Paragon has altered the length and number of employee breaks, as well as the paid or unpaid status of said breaks. When Paragon assumed operational control on September 1, 2013, it put in place a break structure different from the break structure set forth in the Knight CBA.
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> Article VI of the Knight CBA states that employees who are regularly scheduled to work at least 32 hours per workweek shall be considered "full-time." Effective September 1, 2013, Paragon considered a "full-time employee" to be an individual who regularly works a minimum of 40 or more hours per week on a continuing basis.
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> Article XXIII of the Knight CBA states that, effective October 1, 2012, employees shall receive a uniform allowance of sixty-five cents ($0.65) per hour worked. These monies were paid to employees as wages in their paychecks. Effective September 1, 2013, Paragon did not provide an hourly uniform allowance.
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> Article XXIV of the Knight CBA provides, in part, that employees may receive the cash equivalent of the Health and Welfare fringe benefit amount if the employee can produce evidence of comparable medical group coverage in an employer-sponsored medical plan, either through a spouse or another employer. If an employee could present such evidence, he or she could receive the cash equivalent of the Health and Welfare fringe benefit as wages in his or her paycheck. The benefit was paid based on hours worked, up to 80 hours of bi-weekly pay. Effective September 1, 2013, Paragon did not provide employees with the option of receiving the cash equivalent of the Health and Welfare fringe benefit as wages in an employee paycheck.

> Article XXVI and the Appendix of the Knight CBA set forth the employer's pension contribution. Effective October 31, 2012, the employer's pension contribution was $1.19/hour worked, up to a maximum of 80 hours of bi-weekly pay. Knight and the Union had an established past practice wherein unit employees could receive the employer's pension contribution as wages in their paycheck. Effective September 1, 2013, Paragon did not provide unit employees with the option to receive the employer pension contribution as wages in their paycheck. Rather, Paragon directed its pension contribution to a company-sponsored 401(k) plan maintained for each unit employee.

The parties stipulated the differing terms and conditions of employment described above were announced and implemented by Paragon without bargaining with the Union. Paragon assumed operational control of security for the FEMA Building on September 1 with a workforce consisting of a majority of PSOs who formerly worked for Knight at the FEMA Building. Thereafter, Paragon recognized the Union as the collective bargaining representative of the PSOs at the FEMA Building, and bargained with the Union for a new collective bargaining agreement. Paragon and the Union reached a collective-bargaining agreement on or about August 15, 2014 covering the time period of August 15, 2014 through November 30, 2017.

Myron Birdsong, a security officer working for Paragon, was called by the General Counsel as a witness. He began his employment with Paragon in September 2013 working at FEMA at the headquarters building located at 500 C Street, Southwest. Prior to working for Paragon, Birdsong was employed by Knight where he began working at the FEMA headquarters in 2011. Birdsong estimated there were about 50 to 60 bargaining unit employees who worked at the FEMA headquarters. In addition to the 500 C Street address, there is a FEMA annex building in Southwest which houses bargaining unit employees. Birdsong has been a member of the Union since 2011, but has never has held a union office.

Birdsong learned Paragon was taking over the contract from Knight in the spring of 2013, through word of mouth, and he saw the memo from Paragon posted in the control room which announced Paragon's June 29 job fair. Birdsong testified the control room is where the security officers have their guard mount, which is their daily briefing from their supervisors. Birdsong estimated he saw the memo posted about a month before the job fair. Birdsong applied for employment with Paragon online as instructed by Paragon's job fair memo. Birdsong completed the online application in advance of the job fair. Birdsong received an email confirming he had submitted the application. Birdsong credibly testified the online job application did not indicate anything was going to change concerning his working conditions. He testified the application said nothing about: the uniform allowance, paid or unpaid breaks, the length of breaks, how he would receive his health and welfare or pension contribution. It did not say how many hours were needed to be a full-time employee. Birdsong testified the email confirmation for the application did not contain any information regarding these matters.

However, the application stated:

> If hired, I agree and understand that I will conform with the policies practices and procedures of Paragon. I further agree that my employment is "at-will" This means that either Paragon or I may terminate the employment relationship at any time, with or without notice, and with or without cause. I understand that Paragon retains the right to establish compensation benefits and working conditions for all of its employees. Accordingly, I understand and agree that Paragon retains the sole right to modify my compensation and benefits, position, duties, and other terms and conditions of employment, including the right to impose disciplinary action that Paragon, at its sole discretion, determines to be appropriate. No employee or representative of Paragon, other than the President of Paragon, Inc., has the authority to alter the at will nature of my employment relationship, or make any agreement inconsistent to the foregoing.

Birdsong attended the June 29 job fair at the Greenbelt, Marriott. Birdsong testified that, upon arriving at the job fair, he went to a desk, signed in and then received a packet to be filled out. Birdsong testified the person he encountered first was Paragon Representative Rick Waddell. Lori Raines, who worked in HR for Paragon, also attended the job fair. Raines had some assistants with her. Birdsong testified he was directed to go inside the room where he completed his paperwork. It took Birdsong about 20 minutes to complete the packet which contained tax forms, a direct deposit form, an offer letter, some EEO policy papers, and things of that nature. Birdsong testified there was a uniform sizing document in the packet.

The offer letter in Birdsong's packet was dated June 29, and has his name on it. It contained the information described above with respect to the June 29 offer letters to all Knight employees who received one. Birdsong testified he read and signed the offer letter and turned it in to Paragon officials on June 29. Birdsong testified the offer letter contained different working conditions than were in place with Knight. He testified first was the rate of pay located on the third page, the $24.29 for 500 C Street. Birdsong testified that Paragon remedied that before they took over the contract. Birdsong testified that another change was that health and welfare was no longer going to be given to the officers as a wage that it was going to be put in their 401(k) plan. Birdsong testified that other than those two items there were no announced changes in working conditions in the offer letter.

Birdsong testified that when they completed filling out their hiring packets received on June 29 at the Marriott, the officers waited to be called up front. There was a panel there that reviewed the hiring packet with the officers. Waddell and Raines were sitting at the table along with about five assistants. Birdsong met with a man at the table and Birdsong provided him with his hiring packet, social security card, birth certificate, driver's license, and a blank voided check for them to make direct deposits of his pay. Birdsong testified he submitted qualifications including certificates of training that he had. Birdsong testified he met with the person at the table for about 20 to 25 minutes, and then he left. Birdsong testified that he was told at the table there would be an orientation soon, and it would be announced. Birdsong testified the man at the table did not ask him any questions about his professional or educational background. He did not

inquire why Birdsong was interested in working at Paragon. Birdsong testified when he left the Greenbelt Marriott on June 29, he was under the impression he had been hired.

Birdsong testified, on cross-examination that at the job fair Paragon responded to a lot of questions the officers asked. Birdsong, himself, asked questions including whether Paragon was going to go by the CBA. Birdsong testified they had CBA in their building and there were officers at the job fair from different sites that had different CBA's than the one where Birdsong worked. Birdsong testified the officers at his building wanted to know whether Paragon was going to honor their collective-bargaining agreement because their pay was higher than that in the surrounding areas. Birdsong testified that he as well as others asked this question stating this was the main concern. He testified he asked this when the floor was open for questions. Birdsong testified he read the bullets points in Paragon's offer letter including the statement that "You will not have the option of receiving a cash payment in lieu of health and retirement benefits." He testified he understood from it that he would not have the option of receiving a cash payment in lieu of health and retirement benefits. Birdsong testified that he understood that was different from what happened under the Knight CBA. He testified as to pension benefits at Knight he had the ability to get that paid directly to him. He testified he understood from Paragon's letter that under Paragon he would have his own 401(k) account and the money he was entitled to receive would be placed in that account. However, Birdsong testified that aside from the change in the placement of health and welfare funds the Paragon offer letter was not specific that other employment conditions were going to change.

At one point on cross-examination, Birdsong testified the employees kept asking Waddell if their rate of pay would change, and if Paragon would be honoring the CBA, and he testified Waddell responded, "everything will remain the same." Birdsong testified they asked Waddell if Paragon would honor their CBA, to which he replied, "everything would remain the same." Birdsong testified the number one question at the June 29 job fair was whether they were going to be paid the collective-bargaining wage rate. Birdsong testified the wage rate in the offer letter was low and everyone wanted to know if this was what Paragon was offering because they had a CBA, and they were getting paid a certain rate, and if they signed the offer letter are they bound to it. He testified the answer given was no this was just an offer letter. He testified they were told the wage rate in the offer letter was wrong, and they would be paid the wage rate in the collective-bargaining agreement which was what Waddell was telling them. Then the following exchange took place:

> Q. And was Rick Waddell being broader than that? Was he saying, and not only will we pay you what's in the wage rate, we're going to do everything exactly the way it was done in the Knight contract even though you're signing this and saying that changes are going to be made? Did he say—
>
> A.He wouldn't give up that information like that, no. We bombarded him with questions, and with the bombardment of questions, he had, you know, to give some answer to the questions that were being asked.

Following the job fair, Birdsong saw a memo posted by Paragon at work stating, "On August 24, 2013, we will be holding a Mandatory New Hire Orientation at the following location." The memorandum gave the time as 10 a.m., and listed the Greenbelt Marriott as the place. It stated, "During the Orientation you will receive a presentation with information on the company and your benefits. In addition, the following items will be handed out: Employee Handbook; Benefits Packet."

Birdsong attended the August 24 orientation, which was attended by Paragon officials Waddell and Raines, along with others. Birdsong testified that, at orientation, they were given an employee handbook and a benefit packet. He testified this was the first he had seen the Paragon employee handbook. Birdsong estimated the orientation lasted no more than 2 hours. He testified the orientation began by Raines discussing the benefit package. Raines used a Power Point. Birdsong testified Raines stated if they had insurance they could opt out of the insurance and put their moneys in the 401(k) plan. Birdsong testified Raines did not speak about a uniform allowance, or the pension. He testified she did not talk about how many hours they needed to work to be a full-time employee, or about breaks.

Birdsong testified that Waddell spoke at the orientation for about 45 minutes. He testified Waddell talked about the Company and went over the handbook, but Waddell did not go over every page of the handbook. Birdsong did not recall in particular any policies Waddell discussed from the handbook. Waddell opened the floor to questions. Birdsong testified the main question was whether Paragon was going to pay them the same pay they had been receiving with the prior company because they had a CBA in place. They wanted to know if Paragon would honor the CBA and pay them their rate of pay. In this regard, Paragon's offer letter pay rate was lower, and the employees were concerned Paragon was going to drop their pay. Birdsong testified Paragon fixed the pay rate before he started working for Paragon. Birdsong testified Waddell also talked about vacation pay, and he was asked questions about health and welfare. Waddell was asked if they were going to be receiving their health and welfare as a wage and he said no. Waddell said it would be going to the benefit plan. Birdsong testified that when he worked for Knight they received an hourly pension contribution of $1.19 an hour as a wage in their paycheck. Birdsong testified it did not go into their 401(k). Waddell said they would no longer receive the pension contribution as a wage that it would go into the 401(k) plan. Birdsong testified he asked if the collective bargaining agreement would change. He testified Waddell said in response that everything would remain the same. Birdsong testified Waddell did not discuss break structures or tell them they would be receiving an unpaid lunch break. He testified they were not told the hourly uniform allowance they received at Knight would be discontinued. He testified neither Waddell nor Raines discussed how many hours an employee needed to work to be full time. Birdsong testified he never interviewed with Paragon before they assumed operations. Birdsong testified he received and reviewed the Paragon employee handbook at the orientation meeting. The handbook is over 50 pages in length and at page 39, it states, "A Full-time employee regularly works a minimum of 40 or more hours per on a continuing basis and has completed the

introductory period."

Birdsong testified Waddell spoke about the offer letter at the orientation. Birdsong testified "the only thing I remember is the questions that were asked of him about the offer letter, you see, and about the CBA. Because we were under the impression that nothing would change, regardless of what the full-time in your—in this handbook, that says 40 hours, on our site, per our CBA, 32 hours is full time. So when you tell us that nothing is going to change, then this, what I just read to you, means nothing because you're telling me nothing's going to change. So we're not worried that—we're not concerned. That's not concern. It doesn't raise a red flag." Then the following exchange took place:

> Q. When he said nothing's going to change, was he talking about the wage rate?
>
> A.Like I said, we asked—we bombarded him with questions in accordance to the CBA, you know, it was this question, that question, this question, that question, you see. It wasn't just a broad statement or, yes, we will honor your—the whole CBA. Of course, he wouldn't say anything like that. We had to—we tried to ascertain was he—were they going to honor our CBA. So we kept saying, you know, we have a CBA. Our CBA says this. Our CBA says that.Will that change? Will this change? No.

As can be seen from the above discourse concerning Birdsong's testimony, he vacillated between stating that at the job fair and orientation that Waddell in response to questions stated Paragon would honor Knight's CBA and nothing would change, to stating, "Of course, he wouldn't say anything like that." Noting this was only brought out on cross-examination, I do not find based on Birdsong's testimony that Waddell made statements at either the job fair, or the orientation that Paragon would honor Knight's CBA. Rather, I find as Birdsong testified that errors in Paragon's June 29 offer letter generated a lot of questions from the officers, and that Waddell's response to these questions while assuring them that Paragon would honor the wages set forth in the Knight CBA, created confusion as to what other Knight CBA benefits Paragon might honor. I do not find Birdsong's occasional testimony that Waddell stated Paragon would honor the Knight CBA to be an intentional misrepresentation. Rather, I find Birdsong's memory on Waddell's specific statements was clouded by the passage of time, and as well as the barrage of questions from security officers that Respondent's offer letter engendered. I find misstatements by Respondent in its June 29 offer letter about wages, and pension and health and welfare rates concerning those in the Knight CBA and assurances by Waddell at those meetings that Paragon would honor the CBA in certain respects created confusion amongst the employees as to what Paragon was actually offering.

Birdsong testified their hourly rate of pay with Knight did not change after they were hired by Paragon. Birdsong testified the health and welfare contribution being received as wages changed, but their employees already knew that. Birdsong testified the employees had no clue that breaks were going to change. Birdsong testified where it states in the offer letter that, "Breaks will be provided in accordance with company policy," did not signify to him there was going to be a change because Paragon's break policy could have been the same as Knight's.

Birdsong testified he learned he was no longer receiving a uniform allowance when the employees looked at their first paychecks from Paragon. For Knight, there was a line item on the check for uniform allowance, which was absent from the checks from Paragon. Birdsong testified that prior to September 1 no one from Paragon had told him that the hourly uniform allowance was going to be discontinued. Birdsong later testified that by the first two checks they received they figured out they were not receiving a uniform allowance, and he testified that was about a month or so.

Birdsong testified when he was employed by Knight the employees received an hour in paid breaks. There was one 30-minute and two 15-minute breaks per 8 hours worked, or the employee could just take the whole hour at a time. Birdsong testified they worked 7 hours at Knight and got paid for 8. Birdsong testified when Paragon took over operations on September 1, his breaks did not change initially. He testified the break structure changed around a month after Paragon took over. Birdsong testified that around a month after Paragon took over he no longer received a paid lunchbreak. Birdsong testified after Paragon took over and made the changes to breaks, when Birdsong worked an 8-hour shift he was only paid for 7 hours and 30 minutes. Birdsong testified the first paycheck he received from Paragon the hours he was paid included the time he spent on his lunchbreak. He testified that in subsequent checks the hours did not match up. Birdsong testified it was a couple of months after he got there that he realized he was not being paid for his lunchbreaks by Paragon. Birdsong testified he could tell by calculating the hours in his check and the amount of pay that for around the first 2 months he was being paid 40 hours and therefore he was being paid for his lunchbreak. He testified this changed around 2 months after Paragon came in and the supervisors announced the employees would no longer be paid for their lunch break. He testified at that time he made calculations and determined he was not being paid a full 40 hours. He testified when the supervisors announced the change the employees had to start signing in for their breaks.

Birdsong testified he learned Paragon had increased the hourly threshold for full-time status from 32 to 40 hours much later on. He testified it was over a year. Birdsong testified this had a tremendous effect because it impacted their personal leave and vacation pay. It also affected the rate of pay they were receiving to go into their 401(k). He testified a full-time employee gets the full vacation benefit, a part time receives a prorated benefit.

Grady Baker works for Paragon as vice president of operations. Baker testified Paragon provides armed force protection to the Federal Government in various aspects, including security officers working as guards in Federal buildings. Baker testified Paragon's operations are in 42 states in the United States and many of the territories including Saipan, American Samoa, and Guam. Baker testified there have been over 30 contract transitions to Paragon since the President's executive order pertaining to the right of first refusal of a job offer to the predecessor contractor's employees, with at least 15 in 2014. Baker testified there were two occasions in 2014 where less than 50 percent of

the predecessor's employees came to Paragon on Federal contracts. He testified he did not recall it happening in 2013. Baker testified with the vast majority of contracts in the last 2 years more than 50 percent of the predecessor's employees have been hired by Paragon making it through the vetting process and beginning work. Baker testified over 90 percent of the employees Paragon employs are union represented.

Baker testified the items specified in a wage determination that have to be met by the contractor are: hourly wages, health and welfare minimums, minimum requirements for vacation, and some locales prescribe how breaks are to be conducted. Baker testified there are provisions and guidelines for amounts to pay for uniform maintenance allowance (UMA). Baker testified when Paragon is going to bid on a location and there is no CBA in place he looks at the wage determination to determine what Paragon has to pay as a minimum amount. Baker testified, if the predecessor contractor has a CBA, Paragon is bound by the wages and fringe benefits of that contract. He testified whatever the employees are making per hour, the health and welfare, vacation, vesting is all predetermined and is owed to the employees. Baker testified Paragon has to ensure when they go into a new contract they are paying at least those collectively bargained minimums because those wages become the wage determination for the applicable contract and this is made clear by the contracting officers when they put out the solicitations on behalf of the Federal agencies. Baker testified when they are interested in bidding for a contract most times Paragon receives a copy of the predecessor's CBA. Baker testified he reviews the predecessor's CBA wage appendices because that is what Paragon is required to meet, and how they determine what to put in the offer letter for wages. He testified Paragon does not look at the predecessor's other provisions or economic or noneconomic terms of employment because Paragon has their own company policies and practices which they propose and were awarded the contract based on. Baker testified they are not interested how other companies do their business unless they are beating Paragon in the competitive market.[5]

Baker testified that, prior to the FEMA contract; he has been involved with Paragon taking over a Federal contract from a competitor over 50 times since 2008, when Baker started with Paragon. Baker testified he is the liaison between whoever they contracted with and Paragon, and he is also responsible for making sure that Paragon sets up the logistics such as job fairs to make sure they have enough personnel to be able to staff the contract on day one. Baker testified when Paragon has taken over contracts from a competitor in about 45 to 46 of the 50-plus contracts the competitor's employees were represented by a union. Baker testified he is aware of no instances where Paragon adopted the predecessor's union contract. Baker testified, concerning the FEMA contract, Baker was responsible for ensuring they had enough people recruited, hired, trained, qualified, and ready to work on day one. Baker testified Paragon used Knight's union contract at the FEMA building to price out what Paragon was legally obligated to pay in terms of wages and fringe benefits. Baker testified Paragon does not assume that the Union will be representing the employees because, "it's not in every instance that we get a majority membership to come aboard especially in this region."

Baker testified Paragon has developed a procedure on how to communicate to incumbent employees the terms Paragon is offering. Paragon's first communication to incumbent employees is the job fair announcement. He testified Paragon posts it at the location for the incumbent workforce with permission of the client. Copies are also left with the incumbent management if they are willing to speak with Paragon, and Paragon asks them to pass it out without disrupting operations. Baker testified the posting announces Paragon won the contract they are working on and Paragon is hosting a job fair, and to be at this place at the specified time and to make sure to bring things to prove who you are, including your social security card, driver's license, et cetera and to apply on line.

Baker testified Paragon trains its personnel who conduct the job fairs for questions at the job fair. He testified Paragon representatives are taught to direct the officers to the offer letter concerning questions about pay, and if they have further questions they can direct them to Baker, the HR representative, one of Paragon's attorneys, or someone senior in the company. He testified Paragon job fair representatives are trained for the frequently asked questions one of which is if Paragon is going to honor the CBA of the predecessor. Baker testified people are trained to say no to that question.

Baker testified Rick Waddell's title at Paragon was the project manager for the D.C. region. He testified Waddell was no longer working for Paragon at the time of the trial and he was living in West Virginia.[6] Baker testified Waddell went through training in terms of what to say in response to questions about the CBA and questions about the job offer. Baker testified he attended seven of the job fairs Waddell conducted while working for Paragon, including the FEMA job fair. Baker testified at those job fairs he heard Waddell receive questions about whether Paragon was going to adhere to the predecessor's CBA. Baker testified when they specifically asked are you going to be adopting the CBA, Baker and Waddell gave them the same answer "which is we currently do not have a CBA with Knight Protective Security or your union. If at the end of the process, a union presents itself, we'll enter into negotiations in good faith."

Baker testified Paragon wants the officers to complete the applications before coming to the job fair because "We can't issue

[5] I did not find this particular aspect of Baker's testimony to be convincing in that it appeared to be formulated in support of Paragon's legal position. For example, the Knight CBA was not terribly complex, and I do not credit Baker's claim that when they had access to it that he and Respondent's other officials did not review its contents, whether or not they felt obliged to follow its terms. I would also note that Paragon's offer letter specifically stated employees would not have the option of receiving health and welfare payments as part of their paycheck, rather it would be placed in their 401(k) plan. Thus, the offer letter changed a benefit provided by Knight listed in its CBA which was not contained in the CBA appendices, but in the heart of the agreement at article XXIV.

[6] Baker testified Lori Raines also no longer works for Paragon and had moved to Florida.

contingent offers of employment until you've applied, officially applied with the company unless you express interest, and everybody who works for Paragon from top to bottom has to apply online through our HMS system before being considered for positions." He testified Paragon wants people to apply in advance of the job fair to know who is coming to the fair, and how much support personnel Paragon will need at the meeting. Baker testified Paragon's job fair memo asks people to bring certain documents so they can prove who they are because that is part of the interview process. Baker testified they present themselves with their social security card, they fill out I-9s, and they provide their driver's license data. Baker testified the job fair announcement memo states offers of employment are contingent upon successful passing of all the pre-employment requirements. Baker testified contingent means, "we're giving you an offer, but it's not a guarantee of employment on September 1st. That's just the first part of the process. We're giving you a contingent offer of employment meaning if you meet all the terms and conditions, if you accept our employment, and if you qualify with all the bona fides that I explained earlier for your training, your medical certifications, et cetera, then essentially you'll have a place to work on 1 September." Baker testified the job fair memo is not an offer of employment. He testified, "an offer of employment is an offer letter. This is just how to go and apply for a job with us."

Baker testified when someone comes to a job fair if they are an incumbent they check in and if they have applied in Paragon's system it is likely Paragon has an application and a packet for them which include a contingent offer letter. He testified Paragon will ask them for their paper work. Baker testified for the incumbent work force Paragon has their credentials and knows to that point they are an officer in good standing on the current contract. For the incumbent officer, they come in and receive their packet with the offer letter and behind that there is benefit paperwork, the I-9, direct deposit forms, benefits explanation forms, and all of the information someone would need to be put into Paragon's system. Baker testified the offer letter is on top in the file and the first thing the incumbent sees.

Baker attended the June 29 job fair. He testified it started at 10 a.m. and Baker left around 4 p.m. Paragon was billed for the use of the facility until 5: 30 p.m. Baker testified there was minimal activity at the time he left. Baker testified when people arrived they signed in. They were directed inside where there were folders containing their information including contingent offer letters. They went back to the tables, took a seat, read through the information, and filled out the paperwork. He testified once they were done filling out the information, they came back and signed in again, at which time they were called up to have the paperwork reviewed and went through the interview process with attending Paragon representatives. Baker testified when they turned in the paper work they had to complete their uniform size survey and give Paragon their measurements. Baker testified Paragon had people with a tape there who would did a fitting for the officers' body armor. Baker testified they were told they would be instructed as to when the next range dates would be, when the training dates would be, and this would be communicated through their site manager.

Baker testified there was no specific question and answer session at the June 29 job fair. Baker testified there were questions and answers when they would come up with their packets, and if they had questions, then we would answer them. However, he also testified people raised their hands and asked questions. Baker testified Waddell was asked questions at the job fair, and that Baker was present for all of the questions that Waddell was asked that Baker knew of.[7] Baker testified someone asked about the pay rate, that the rate listed on the back of the contingent offer letter for FEMA was incorrect and wanted to know if this was what they were getting paid. Baker testified the answer was no that they would be getting paid what you are getting today. Baker testified Waddell said, "I'm not sure what's in your CBA, but if there's, if there's a CBA out there or wage determination we don't know about, we'll research that. "If there's money that we owe you, we're—we're going to pay you what's legally owed." Baker testified he did not hear Waddell address that point more than once.

Baker testified that other questions asked of Waddell in the meeting, where about the types of uniforms they would be receiving, could they wear their own boots. Baker testified, "I mean it was all kinds of various questions. Are we going to be on 12-hour shifts? Currently, you know, we work 12s." Baker testified, "The majority of the answers were we don't know at this time. The offer, you know, you have your offer letter. We still don't know who's going to be there yet because there were—we were recruiting for more than one location at this job fair." Baker testified there were five sites they were recruiting under this contract. He testified there were a ton of questions going back and forth. Baker testified there were no questions about whether people would get a uniform allowance or a shoe allowance. Baker testified they did not promise anyone that they would get a uniform or shoe allowance. Baker testified the job fair was conducted in a large room with the capacity to hold 300 people. He testified at the initial rush there were about 60 people in the room. Baker testified he was not standing next to Waddell the whole time Baker was there. Baker testified he did not hear every question Waddell was asked. Baker testified he did not hear anyone at the job fair raise a question to himself or Waddell about whether Paragon was going to keep everything the same as under the Knight contract. He testified he also did not hear anyone ask a generalized question as to whether everything was going to be the same as under Knight. Baker did not hear Waddell state that everything was going to be the same as under Knight.

Concerning the June 29 contingent offer letter of employment, it states shift schedules to be determined in accordance with the operational needs of the contract. Baker testified this meant depending on the number of personnel they had, they will devise the shift schedule, such as whether they would be 12 or 8 hour shifts. Baker testified, at the time of the job fair, he did not know how the shift schedules would be set up on September 1. It is stated in the letter breaks will be provided in accordance

[7] Despite this testimony, Baker later testified that the job fair was in a very large room, that there were as many as 60 officers there in the morning rush, and he was not at Waddell's side for the whole time Baker was there.

with the company policy and in compliance with any applicable state, federal law requirements subject to the operational needs of the contract. Baker testified their company policy is, unless otherwise stipulated by the statement of work provided by the government, they follow the wage determination laws for the minimum break requirements. Baker testified there was nothing in the FEMA statement of work that required Paragon to set up breaks in any particular fashion. Baker denied hearing Waddell tell anyone at the job fair that breaks would be done in the same manner as they were done by Knight.

Baker testified that, after the job fair is completed, then the predecessor's incumbents have to qualify for the new contract. To qualify, they have to go through use of force training with Paragon, which pertains to the use of their firearm. He testified, if they had OC training or if they had baton certification which is expired, they have to go through that use of force training with Paragon. Baker testified Paragon does its own use of force training. He testified they have to go for new medical testing. He testified the medical requirements from the old contract to the new one had changed at FEMA. The new one required a seven-panel urinalysis as opposed to a five panel. They also had to be sized for uniforms and for their body armor, which was a new requirement. Then they are sent for the fit testing which is not only the medical testing, but also a cardiovascular test.

Baker testified the next meeting with the incumbent employees was the orientation meeting. Baker testified there were eight orientations in Waddell's region while Waddell worked for Paragon. Baker testified he spoke at seven of them, and only missed one, which was the one pertaining to the FEMA building. Baker testified he spoke to Waddell and others about how to respond to employee questions at orientations. Baker testified they know the typical questions people are going to ask because they have heard them before. Baker testified, at the sessions he attended with Waddell, there were questions about whether Paragon was going to honor the CBA in place with the predecessor. Baker testified that, during the seven orientations he attended with Waddell, Waddell gave two answers, one was no union has presented itself to the company and we are not currently in negotiations or, two, no, we are not adopting it and we will enter into negotiations once we figure out who shows up on day one because we are not there yet. Baker testified Waddell never said anything suggesting Paragon would continue to employ the officers under the same terms and conditions as the predecessor's CBA. Baker testified Waddell never made the generalized statement that everything was going to remain the same while Baker was present.

Baker testified employees were given a copy of the hand book at the orientation meeting as part of Respondent's practice. The employee handbook contains a section on uniforms and appearance. It states that the officer will be issued either "wash and wear" or "dry clean-only" uniforms. It gives maintenance instructions for each and states if they were provided dry clean only uniforms they will be provided clean uniforms or reimbursed for dry cleaning expenses. Baker testified it is Paragon's policy that if they are able to provide wash and wear uniforms and uniform replacements at no cost to the employee, then they were not going to pay the uniform allowance for dry cleaning. Baker testified Paragon provides wash and wear uniforms at the FEMA location and does not provide a uniform allowance there.

Baker testified that on the first day of the contract, September 1, the direction from Paragon was that officers were to receive one 15-minute break per 4 hours of work and one unpaid meal break for 30 minutes. If they worked 8 hours, they would get two paid 15-minute breaks and one unpaid 30-minute break. However, Baker testified that was not what actually started the first pay period. He testified they found in the first pay period the supervisors were not deducting the 30-minute break in the payroll system on a consistent basis. Some of them were, and some were not. Baker testified for the first pay period some of the officers may have been paid a full hour in breaktime for an 8-hour period, which would include a 30-minute lunch and two 15-minute breaks. Baker testified he found out about this problem the first pay period when they were doing payroll review. Baker testified, "We immediately corrected it going forward." He testified, "I called Rick Waddell and said, hey, your supervisors at the site are paying for breaks, are paying for some of these breaks, not all, but you need to get on your folks and make sure that they're following company policy." Baker testified Waddell would have received the same reports Baker received concerning the officers being paid for their lunch breaks. However, Waddell did not pick up the error in payment on his own at the time Baker called him about it. Baker testified the problem about paying some of the officers for the 30-minute lunchbreak was corrected in October at the time of the second pay period on October 3. The prior and first paycheck had issued on September 19.

B. Analysis

1. Respondent's 10(b) defense

Section 10(b) states in pertinent part that "[N]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Section 10(b) is an affirmative defense which must be pleaded and if not timely raised, is waived. E.g., *Federal Management Co.*, 264 NLRB 107 (1982). The burden of proving an affirmative defense is on the party asserting the defense. See *Chinese American Planning Council*, 307 NLRB 410 (1992), review denied 990 F.2d 624 (2d Cir. 1993); and *Kelly's Private Care Service*, 289 NLRB 30 (1988). The burden is met by showing the filing party had actual knowledge or constructive knowledge of the alleged unfair labor practice more than 6 months prior to the filing of the charge. *Duke University*, 315 NLRB 1291 fn. 1 (1995); *Mine Workers Local 17*, 315 NLRB 1052 (1994). Notice, may be found even in the absence of actual knowledge if a charging party has failed to exercise reasonable diligence, i.e., the 10(b) period commences running when the charging party either knows of the unfair labor practice or would have "discovered" it in the exercise of "reasonable diligence." *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), enfd. mem. sub nom. *Gilmore Steel Corp. v. NLRB*, 134 LRRM 2432 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990). *M & M Automotive Group, Inc.*, 342 NLRB 1244, 1246 (2004). See also *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1317 (11th Cir.1999). Whether and when a charging party should reasonably have known of an unfair labor practice requires a case-specific factual determination. See,

e.g., *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 634 (9th Cir. 2007) (concluding that substantial evidence supported the NLRB's finding that labor organization "did not have actual or constructive knowledge" of unfair labor practices); *Michael Konig*, 318 NLRB 337 (1995) (concluding that evidence was insufficient to establish that exercise of reasonable diligence by labor organization would have led to earlier discovery by the organization of unfair labor practice); *Moeller Bros. Body Shop, Inc*., 306 NLRB 191 (1992), (concluding complaint to be untimely because facts demonstrated that labor organization, exercising reasonable diligence, should have discovered unfair labor practices more than six months before it filed its complaint).

In *Duke University,* 315 NLRB 1291, 1292 fn. 1 (1995), it was stated:

> Having adopted the judge's credibility findings with respect to the testimony of full-time drivers Louise Davis and Melton Thompson and International Vice President of Amalgamated Transit Union Tommy Mullins, we agree that the Union did not have actual notice of the Respondent's unfair labor practices prior to 1993. We further find that there is no basis for concluding that the Union should have known of the conduct before July 1993. As the judge found, the Respondent was refusing to recognize the Union at the relevant times, and thus the Union was not able to perform its function as collective-bargaining representative. *Clark Equipment Co*., 278 NLRB 498 (1986). The Respondent also relies on *Southeastern Michigan Gas*, 198 NLRB 1221 fn. 2 (1972). In that case, the Board left open the issue of whether the 10(b) period would begin to run only on notice to the union when the changes are not open and obvious. The Respondent apparently infers from this that the 10(b) period would begin to run *prior* to notice to the union, i.e., on notice to employees, where the changes are open and obvious to the employees. Whatever the merit of this interpretation, it has no relevance here. The changes here were not open and obvious to employees until within the 10(b) period. The nature of the Respondent's policy changes at issue here were subtle and evolving, the full impact of which could not readily be appreciated by the employees outside the 10(b) period.

Similarly, In *Concourse Nursing Home*, 328 NLRB 692, 693–694 (1999), the Board reversed the judge in concluding that Section 10(b) did not bar a union from seeking pension contributions for the respondent employer's licensed practical nurses (LPNs) for periods before June 1, 1995. As part of a CBA that expired on September 30, 1994, the parties agreed to a 35-month moratorium on future contributions to the Union's pension fund because of a surplus in the fund. The moratorium ended on May 30, 1994, and the respondent was obligated to resume making payments to the fund beginning in June. The union's pension fund did not receive any contributions from the respondent for the unit employees covering the month of June until the following October. The fund determined, after receiving the respondent's October pension check, that the payment total was less than the fund should have received. All the pension fund contributions the respondent made during the ensuing months were also "short" by the calculations of the fund's accountants. There, the pension fund office administered 9 or 10 separate funds and received monthly contributions from a total of 170–200 employers contributing to the various funds. The frequency of inadequate or otherwise incorrect payments to the funds was so great that the fund office prepared a form letter that it sent monthly to those employers whose contributions were less than the proper amount. In October, the Union's fund office sent a "short notice" letter to the respondent stating that its pension fund contributions for "July" were deficient. The fund sent similar letters notifying the respondent of pension underpayments the following months. After receiving no response to the "short notice" letters, a fund representative contacted an agent of respondent in May or June 1995 to discuss the shortages. The fund representative was told the respondent was refusing to make pension contributions for its LPNs until further notice. The respondent employer representative stated he had filed some sort of petition regarding the LPNs which precipitated this action. Thereafter, the Respondent ceased all pension contributions for months since June 1995. There in reversing the judge and in finding Section 10(b) did not serve as a bar to the charge the Board took into account the volume of incorrect pension payments the union's pension fund received, the history between the parties, and stated "an unfair labor practice charge will not be time barred if the 'delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party.' Based on the totality of the evidence, we conclude that the situation here was, at the least, sufficiently ambiguous as to whether the Union had "clear and unequivocal notice . . ." Id. at 694.

An employee's knowledge of the occurrence of an unfair labor practice is not *automatically* imputed to the employee's labor organization. See *Stone Boat Yard v. NLRB,* 715 F.2d 441, 445 (9th Cir.1983) (concluding that knowledge possessed by union members was not attributable to union because there was no evidence in the record that the members were agents of the union). The knowledge of bargaining unit employees concerning their terms and conditions of employment being imputed to their bargaining representative for purposes of determining when the 10(b) limitations period commences depends on the factual context. See *Michael Konig,* 318 NLRB 337, 339 (1995). In *Courier-Journal,* 342 NLRB 1093, 1103 (2004), the Board affirmed the following:

> It is appropriate given the factual context here to impute Heine's knowledge to the Union. Heine was not merely an employee. He was a steward and had been a member of the pressroom department bargaining committee for a year at the time of the July 1, 2001, changes. He attended all of the pressroom department bargaining sessions for a new contract. In *Baytown Sun*, 255 NLRB 154, 160 (1981), a union steward's knowledge was imputed to the union for purposes of determining whether the charge was timely where the steward was closely tied to the union, was a member of the union's negotiating committee, and had attended all of the negotiating sessions between the employer and the union. [FN14] Given the factual context in this case, I conclude that, as with the steward in *Baytown Sun*, supra, Heine's pre-September 15 knowledge of the July 1 increases should be imputed to the Union.
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> . . .

> I have considered the decision in *Catalina Pacific Concrete Co.*, 330 NLRB 144 (1999), which the General Counsel cites in its brief. In that case the Board concluded that notice to a "nominal" steward who had crossed the union picket line and was working during a strike, and who the employer itself claimed was a statutory supervisor, was not adequate to initiate the limitations period. Id. at 144, 149. The Board explained that despite such individual's "nominal status as a steward, the [employer] could hardly have reasonably believed that notice of unilateral changes to someone it was claiming as one of its supervisor[s] was an acceptable method of communicating with the Union about those changes." Id. at 144. In the instant case, Heine was not only a steward, but a member of the negotiating committee who had participated in all the bargaining sessions for a successor to the press-room department agreement that expired on August 7, 2000. His status as a union official was not "nominal," but, as in *Baytown Sun*, supra, very real.

In *Brimar Corp.,* 334 NLRB 1035, 1037 fn. 1(2001), the Board majority stated:

> We agree with the judge that Sec. 10(b) of the Act does not bar the complaint's allegations. We adopt the judge's finding that Union Steward Robbie McCaskill's November 1996 knowledge of the Respondent's newly implemented "Workstation Form" is not imputed to the Union for the purpose of triggering the 6-month period prescribed in Sec. 10(b) of the Act for the timely filing of unfair labor practice charges. In doing so, we agree with the judge's finding that McCaskill, although a steward, had no role in matters relating to bargaining, and the Respondent had no reason to believe otherwise. See Catalina Pacific Concrete Co., 330 NLRB 144 (1999); cf. Baytown Sun, 255 NLRB 154, 160 (1981) (union steward's knowledge imputed to union for purposes of determining the charge was not timely filed under Sec. 10(b) where the steward in question was found to be more than a steward in that she was closely tied to the union, she was a member of the Union's negotiating committee, and had attended all of the 25 or 30 negotiating sessions between the respondent and the union.)

In the present case, there is no contention or evidence that the Union was provided with actual notice by Paragon of the changes in working conditions the parties stipulated took place on September 1, 2013. In fact, Paragon submitted a regional director dismissal letter in another case arguing its procedures pertaining to its being a successor have been approved by this agency. First, obviously a regional office dismissal letter is not a Board determination and is certainly not binding on me as the facts of the investigative file in that instance were not litigated before me. Perhaps, more instructive was the Regional Director's determination that Paragon had specifically notified the union, on multiple occasions, prior to taken operational control that it intended to enter into negotiations for a new CBA rather than adopt the existing agreement. There is no contention that such notice was provided to the Union by the Respondent in the present case.

Gaby Fraser works for the Union as director of operations. She is the only paid employee of the Union. Fraser's duties include communications with employers, grievance handling at certain levels of the grievance procedure, serving as the Union's chief negotiator, running the day to day operations of the Union, and filing unfair labor practice charges. She testified the Union is certified or recognized as a collective bargaining representative for 19 bargaining units covering between 1200 to 1500 employees. Fraser testified the Union has shop stewards at around 75 percent of its sites, and the stewards report to Fraser. Fraser testified that while the stewards can file Board charges, that is normally her function. Fraser testified when Paragon took over the contract the officers who were shop stewards at Knight at the FEMA location were let go. Fraser testified she did not have any connection to FEMA.

Fraser credibly testified she first received copies of the Paragon offer letter to employees at FEMA in the early spring of 2014. Fraser testified she learned Paragon was not offering the employees' health and welfare fringe benefit as a wage through phone calls she received in early March 2014 from security officers working at the FEMA site. Fraser described a conversation concerning breaks, pension, and health and welfare with an officer from the FEMA site. Fraser testified that, during the call, the officer stated they do not get health and welfare in their pay anymore. Fraser asked why the officer did not tell Fraser, and was told there was nothing Fraser could have done about it. Fraser testified the employee stated they do not get pension either and she mentioned breaks. Following this conversation, Fraser called some other officers, and she testified she checked with the two former shop stewards who used to work at the FEMA location and they confirmed it. Fraser testified the officers were not receiving the breaks they used to receive. Fraser testified they used to have two 15 minute and one 30 minute paid break. She testified now they were saying they were sometimes getting a 15 or a 30 minute break for the entire day or nothing for the entire day. In her pre-hearing affidavit, Fraser listed a series of changes that took place in working conditions at FEMA under Paragon. Item 1 was listed as, "reduced and/or cancelled employee breaks." Item 6 was listed as "health and welfare and pension monies being diverted to the company plan." Fraser's affidavit states, "I first learned of change 1 and 6 on March 7 or 21, 2014, during a site visit that I will talk about later in my affidavit." While at the trial, Fraser testified she learned of these changes during phone calls with officers, and in her affidavit she recalled it was through a site visit, I have credited her testimony that she first learned of these changes in March 2014, and she attempted to verify the changes through follow up contacts as she described in her testimony at the trial.

Fraser testified she learned in April 2014 that full-time status had changed at FEMA from 32 hours to 40 hours when Paragon took over. Fraser testified when she was talking to one of the officers at FEMA about anniversaries she learned Paragon paid off the officers at the Cohen Building, but they did not pay off at GSA or at FEMA concerning sick leave and vacation. Fraser testified when she was talking to the FEMA officer she was told some of the officers got paid and some did not based on full and part-time status. Fraser testified Paragon changed full-time to 40 hours, and officers who used to work 36 and 37 hours were now being prorated for vacation and sick leave because they were no longer considered full-time. She testified under the Knight CBA 32 hours was considered full-time. Fraser testified from what

she understood this happened late February or early March when the officers were paid out. In her pre-hearing affidavit, Fraser stated she learned Paragon changed the rate of vacation accrual and anniversary dates; that sick leave was not paid out, and that Paragon changed the definition of full-time status from 32 hours to 40 hours, around the first or second week of April 2014, during a conversation with one of the FEMA shop stewards.[8]

Fraser testified she learned the FEMA employees were no longer receiving a uniform allowance by talking to a Board agent in May 2014, at which point Fraser called some FEMA officers to verify. Similarly, in her pre-hearing affidavit, Fraser testified she learned of Paragon's change with respect to a uniform allowance during a conversation with a Board agent on around May 19, 2014.

Birdsong's testimony reveals that errors in Paragon's offer letter to employees about wage rates spawned multiple questions by officers to Waddell at the job fair and orientation about the wage rates Paragon was offering, to which Waddell responded Paragon would honor the CBA concerning wage rates. While Birdsong admitted at points in his testimony that Waddell did not state Paragon would honor the Knight CBA as to all benefits, I find Waddell's responses created further confusion amongst applicants as to what would actually change. Birdsong testified their hourly rate of pay with Knight did not change after they were hired by Paragon. Birdsong testified the health and welfare contribution being received as wages changed, but they employees already knew that. Birdsong testified the employees had no clue breaks were going to change. Birdsong testified that where it states in the offer letter that, "Breaks will be provided in accordance with company policy," did not signify to him there was going to be a change because Paragon's break policy could have been the same as that with Knight. Moreover, while Paragon may have had to adjust scheduling employees break times and shifts, it should have known before the employees were hired that it was no longer going to pay them for their 30 minute lunch break, yet they were never directly informed of this before they started working. In fact, Paragon's supervisors were not even clear on this change because as per Baker's testimony at least through the first pay check, some of the supervisors were entering payroll information causing employees to be paid for their 30 minute lunch break which was only subsequently corrected by Paragon. Birdsong testified the first paycheck he received from Paragon the hours he was paid included the time he spent on his lunch break. He testified that in subsequent checks the hours did not match up. Birdsong testified that it was a couple of months after he started with Paragon that he realized he was not being paid for his lunch breaks by Paragon. Birdsong testified by calculating the hours in his check and the amount of pay that for around the first 2 months he was being paid 40 hours and therefore he was being paid for his lunch break. He testified this changed around 2 months after Paragon came in and the supervisors announced the employees would no longer be paid for their lunchbreak. He testified when the supervisors announced the change the employees had to start signing in for their breaks. No hard evidence was placed on the record either by Paragon or the General Counsel as to when the Paragon employees stopped being paid for their 30 minute lunch break, and Birdsong and Baker's recollections differed as to how quickly this happened. Regardless, Paragon never directly informed employees prior to their being hired that they would not be paid for their lunch break, and its continuing to do pay them for those breaks for whatever period after they were hired, along with errors in their offer letter and representations about those errors created confusion to employees based on Paragon's actions as to what benefits they were being offered.

Birdsong testified he learned he was no longer receiving a uniform allowance when the employees looked at their first pay checks from Paragon. For Knight, there was a line item on the check for uniform allowance, which was absent from the checks from Paragon. Birdsong testified that, prior to September 1, no one from Paragon told him the hourly uniform allowance was going to be discontinued. Birdsong later testified that by the first two checks they received they figured out they were not receiving a uniform allowance, and he testified that was about a month or so. While Paragon's handbook discussed the differences in Paragon's policy between wash and wear uniforms and those that had to be dry cleaned, this was a multipage document and was not tendered to employees until close to two months after they were required to submit acceptance of Paragon's offer of employment, and only about a week before they were to start their employment with Paragon. Even at the August 24 orientation meeting if the employees were aware enough to notice from the multipage handbook that no uniform allowance was to be paid for wash and wear uniforms, there is no showing that they were told at that time that those were the type of uniforms they would be receiving.

Birdsong testified he learned Paragon had increased the hourly threshold for full-time status from 32 to 40 hours much later down the road. He testified it was over a year. Birdsong testified this had a tremendous effect because it would impact their personal leave and vacation pay. It would also affect the rate of pay they were receiving to go into their 401(k). He testified a full-time employee gets the full vacation benefit, a part time receives a prorated benefit. Fraser testified that it was reported to her in April 2014, that some employees received prorated pay for sick leave and vacation because Paragon had changed full-time status to 40 hours. Paragon had reported to employees in their June 29 offer letter that full-time employees would be receiving vacation pay, and it also reported a certain amount of paid sick leave based on some unspecified regulations. It was not until August 24, at the orientation meeting that Paragon gave out its handbook, which contained a statement that full-time employees were those who worked 40 hours. The handbook did not explicitly tie this statement to vacation pay or sick leave, and the separation of time in the two documents reveals that Paragon was rolling out benefit information sporadically in an unclear and confusing way.

The parties stipulated that Paragon and the Union reached a

[8] Fraser's testimony concerning the status of the shop stewards at the trial and in her affidavit is somewhat murky. The employees serving as stewards were not identified, and while Fraser testified Paragon did not retain them, she claimed to have had post transition conversations with the stewards following the Paragon takeover both in her affidavit and in her testimony at the trial.

CBA on or about August 15, 2014. Thus, Paragon would have had access to the role stewards and or any other employees played in those negotiations. Paragon has not established there were job stewards at FEMA during the 10(b) period, nor has it established that any employee had a significant status pertaining to negotiations or connection to the Union to impute employee knowledge of benefit changes to the Union. See *Brimar Corp.,* 334 NLRB 1035, 1037 fn. 1(2001). Moreover, the manner in which Paragon announced and rolled out its benefit package to employees engendered confusion as to those benefits, and in the circumstances here I do not find that Fraser failed to exercise reasonable diligence based on the reports she received in the timing of her filing of the initial and amended unfair labor practice charge. *Duke University,* 315 NLRB 1291, 1292 (1995). Accordingly, I do not find Respondent has established its 10(b) defense.

Cases such as *R. J. E. Leasing Corp.,* 262 NLRB 373, 381–382 (1982), cited by Paragon are not persuasive here. There, an employee filed an 8(a)(2) charge against an employer for entering a pre-hire agreement with a union. There was no union charging party as there is here. The judge with Board approval rejected the employer's 10(b) defense stating the time period did not begin to run until the employees knew of the pre-hire agreement. An employee was the charging party and the issue of whether an employee's knowledge of events should be imputed to a union was not addressed because there was no charging party union. Similarly, I did not find cases such as *NLRB v. Triple C Maintenance, Inc.,* 219 F.3d 1147 (10th Cir. 2000) ,and *Texas World Services Co.,* 928 F.2d 1426 (5th Cir. 1991), cited by Paragon to be on point to the issues presented here. I also do not find Paragon's reliance on *Moeller Bros. Body Shop,* 306 NLRB 191 (1992); and *Mathews-Carlson Body Works, Inc.,* 325 NLRB 661 (1998) to warrant a finding that the Union did not act with reasonable diligence in monitoring Respondent's actions at FEMA. Those cases both involved ongoing bargaining relationships were the respondent employers over a period of years were underreporting the number of alleged bargaining unit members and failing to make fund payments on behalf of those nonreported. In *Mathews* it was noted that the size of the work force was in plain view of one of the union officials outside the 10(b) period when he had visited the site; and in *Moeller* it was noted the union failed to enforce certain contract provisions over a number of years that would have disclosed the respondent employer's failures, that the union never appointed a job steward, and it made very infrequent visits to the employers over a described 5-year period. Here, Fraser testified the Union had shop stewards with the predecessor employer which were not retained by Respondent. She is the only paid employee of a union representing 19 bargaining units covering between 1200 to 1500 employees. Respondent took over the contract on September 1, 2013. Fraser testified she received reports of unilateral changes beginning in March 2014, at which time she began to investigate the validity of those reports. Overtime, additional changes were reported to her. Fraser filed the initial charge in this matter April 24, 2014, and in view of the Union's resources I have concluded the Union exercised sufficient diligence to defeat Respondent's 10(b) defense. This is particularly so, when Respondent a large company had in a copy of the Knight CBA and could have notified the Union in writing at September 1, 2013, or earlier that did not plan to honor the Knight contract, and more specifically could have informed the Union of the changes it intended to make.

2. Respondent is a perfectly clear successor under the Board's *Spruce Up* Analysis

The General Counsel proffers in essence two theories. One that the Respondent became a perfectly clear successor under the Board's analysis in *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975). The General Counsel argues in the alternative that the Board should be overturn *Spruce Up* as it is inconsistent with the language in the Court's decision in *NLRB v. Burns Security Services,* 406 U.S. 272, 294–295 (1972). It is asserted that Respondent is a perfectly clear successor under the much less restrictive language in the Court's *Burns* decision. Since I am constrained to follow current Board law, I have explored and determined that Respondent is a perfectly clear successor under the Board's *Spruce Up* analysis for the reasons set forth below.

A statutory successor is not bound by the substantive terms of the predecessor's collective bargaining agreement and is ordinarily free to set initial terms and conditions of employment. *NLRB v. Burns Security Services*, 406 US 272, 280, 281 (1972). While the Court in *Burns* held that a successor employer is generally free to set the initial terms, it also held that "there will be instances where it is perfectly clear the new employer plans to retain all of the employees in the unit in which it will be appropriate to have the employer initially consult with the employees' bargaining representative before it fixes terms." The Board interpreted the "perfectly clear" exception in *Spruce Up*, 209 NLRB 194 (1974), enfd. per curium 529 F.2d 516 (4th Cir. 1975). There, the Board concluded that the "perfectly clear" exception and the consequent forfeiture of the right to set initial terms should be restricted to circumstances, where the new employer has either actively or by tacit inference misled employees into believing that they would all be retained without change in their wages, hours or conditions of employment or at least to circumstances, where the new employer has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. Id. 195.

Machinists v. NLRB, 595 F.2d 664, 674–676 (D.C. Cir. 1978), the court stated as to the Board's *Spruce Up* decision that:

> Even when *Burns* is read, as the Board does, to limit compulsory initial-terms bargaining to situations wherein the successor has indicated that incumbents will be retained and has not concurrently announced downward changes in employment terms, predecessor-employees are afforded an important measure of protection. Once the duty to bargain has thus attached, the successor is obliged to consult the incumbent union before institution of less satisfactory terms. That is significant because unconditional retention-announcements engender expectations, oft times critical to employees, that prevailing employment arrangements will remain essentially unaltered. Even when incumbents are not affirmatively led to believe that existing terms will be continued,[FN48] unless they are apprised promptly of impending reductions in wages or benefits, they

may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force.

The Board was hardly at liberty to ignore these concerns, and its construction of *Burns* is responsive to them. On the one hand, incumbents informed of the availability of employment with the successor entity but contemporaneously notified of substantial changes in the conditions thereof are not lulled into a false sense of security. When, on the other hand, the announcement of job-availability is unaccompanied by any such warning, incumbents may resolve to cast their lot with the successor, secure in the knowledge that they can invoke the aegis of collective bargaining should alterations in the terms of the employment be proposed.[49]

[49] When the employment offer and a subsequent announcement of changed terms both occur prior to actual hiring, the announcement could deter some employees from accepting, notwithstanding that it is made some time after the successor first makes known his plan to retain incumbents. If, for example, the successor indicates that he intends to reemploy his predecessor's workforce a month hence, and when employees arrive to submit applications two weeks later he informs them that substantially different terms will be instituted, some incumbents may decide to look for work elsewhere. Nevertheless, a duty to bargain with respect to the proposed changes could possibly be properly imposed on either of two grounds. For lack of sufficient time to rearrange their affairs, incumbents might be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms, and perpetuation of the workforce and as well the representational status of the incumbent union may be assured. Even were that less plain, a bargaining obligation may be essential to protect the employees from imposition resulting from lack of prompt notice. Thus a prospective employment relationship may be presumed when a successor has boldly declared an intention to retain incumbents but has not concurrently proposed substantially reduced benefits. And such an inference may be left undisturbed by revelation of employment terms after the employer's initial announcement but before actual hiring commences. The successor would have no legitimate complaint about mandatory bargaining in such circumstances because its necessity is a product of his own misleading conduct.

In *Hilton's Environmental, Inc.,* 320 NLRB 437, 438 (1995), the Board in applying the "perfectly clear" caveat articulated in *Burns* as explained in *Spruce Up* stated:

> Applying these principles to the facts of this case, we find that the "perfectly clear" caveat is applicable in this case. Thus, as discussed above, the Respondent had solicited applications from the employees on September 8, and had assured them the following day that all would be hired unless some problem arose as a result of information disclosed on their applications or in the interview process. Contrary to the Respondent, there was no clear announcement at this time that it intended to establish new terms and conditions of employment. See *Fremont Ford,* 289 NLRB 1290 (1988) (employer told union it had doubts about retention of only a few unit employees; employer's stated desire to change seniority and institute a flat rate insufficient to indicate intent to establish new employment conditions).
>
> To the contrary, the Respondent's entire course of dealing with the employees, including accepting the December 1991 letters of intent that stated that the employees would work for the Respondent at the contractual wage rate, and the Army's having advised the Union, prior to the September 8 solicitation of applications, that the Respondent's contract with the Army was subject to the Service Contract Act and that the Son's collective-bargaining agreement would therefore be incorporated into the contract, all indicated that the Respondent did not intend to establish new terms and conditions of employment. See *Canteen Co.*, above; *Weco Cleaning*, above; *Fremont Ford*, above. Accordingly, we find that the Respondent violated Section 8(a)(5) by unilaterally changing existing terms and conditions of employment[FN 10]

In *Canteen Co.,* 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), the new company, prior to assuming control of operations on July 1, 1992, personally contacted the predecessor employees to say it wanted them to apply for employment. It was noted the respondent also had several discussions with the union representing the predecessor's employees in June concerning its desire to establish a new job classification. The parties discussed the sample contract they would use to begin negotiations for a new collective-bargaining agreement. On June 22, the respondent told the union that it wanted the predecessor's employees to serve a probationary period and the union agreed. On that date, the parties agreed to meet on June 30 to negotiate a collective-bargaining agreement. In its discussions with the union, the respondent did not mention anything about making any changes in the initial terms and conditions and the Board, stated:

> We agree with the judge that the Respondent violated Section 8(a)(5) of the Act when, on or after June 23, the Respondent told three of the four predecessor employees that they could continue working the food services operation, but at significantly reduced wages. Specifically, we find that by June 22, when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. Therefore, as it was "perfectly clear" on June 22 that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.
>
> Our colleagues in dissent contend that the "perfectly clear" caveat in *Burns*, as interpreted in *Spruce Up*, should apply only when the new employer has failed to announce initial employment terms prior to, or simultaneously with, the extension of *unconditional offers of hire* to the predecessor employees. None of the cases cited in the dissent, including *Burns* and *Spruce Up*, expressly limit the caveat to such a late point in the transition from one employer to another. To the contrary, the judge correctly cited *Roman Catholic Diocese of Brooklyn*, 222 NLRB 1052 (1976), enf. denied in relevant part sub nom. *Nazareth Regional High*

School v. NLRB, 549 F.2d 873 (2d Cir. 1977), as a controlling example of the imposition of an obligation to bargain about initial terms of employment prior to the new employer's extension of formal offers of employment to the predecessor's employees.

The facts and the Board's findings in *Hilton Environmental,* supra, and *Canteen Co.,* supra, demonstrate that an actual offer of employment is not required to establish the "perfectly clear" successor's obligation to bargain.[9] Rather, it has an obligation to bargain over initial terms of employment when it displays an intent to employ the predecessor's employees without making it clear to those employees their employment will be on terms different from those in place with the predecessor employer. See also, *Elf Atochem North America, Inc.,* 339 NLRB 796, 808 (2003); *DuPont Dow Elastomers, LLC,* 332 NLRB 1071, 1073-1074, 1074 fn. 7 (2000), enfd. 296 F.3d 495 (6th Cir. 2002) (perfectly clear successor found where the unions were informed that although the successor employer would not honor the predecessors CBA's it would maintain employees' wages and benefits under those contracts); *Helnick Corp,* 301 NLRB 128, 134 (1991); *Turnbull Enterprises,* 259 NLRB 934, 938-940 (1982); and *CME, Inc.,* 225 NLRB 514 (1976).[10]

Similarly, in *Cadillac Asphalt Paving,* 349 NLRB 6, 10-11 (2007) the Board stated:

> The record clearly establishes that Respondent LLC is a "perfectly clear" successor to Respondent Paving. On July 1, LLC assumed control of Paving's operations. On July 7, LLC President Rickard announced the joint venture in a meeting with Paving's entire work force. After Rickard spoke, MPMC Safety Director Marlene Van Patton asked all the employees to complete job applications and W-4 forms to update LLC's records. The employees, including the drivers, completed and submitted their applications that day. After completing his paper-work, driver Steve Pierce asked LLC General Manager Sandell, who was also present at the meeting, about LLC's 401(k) plan. Sandell responded that LLC did not have a 401(k) plan for hourly employees. Aside from the 401 (k) remark, LLC did not announce any changes to the employees' terms and conditions of employment at this meeting. The following day, July 8, the employees returned to work without any changes in operations or duties.
>
> Although not mentioned by the judge in his decision, LLC's hiring process entailed no further measures. Unit driver Pierce testified that LLC did not conduct job interviews. There is no evidence that LLC sought additional applicants from any source other than Paving's work force.
>
> As noted above, at no time before or during the July 7 meeting did LLC mention changes to the employees' negotiated wages, benefits, or other terms and conditions of employment. In fact, prior to this meeting, when employee and Teamsters steward Pierce asked LLC agent Fred Aiken about the Respondents' plans for the Teamsters, Aiken assured Pierce that everything would remain the same. As a result, the drivers reasonably assumed that their terms and conditions of employment would remain the same when LLC took over Paving's operations. Nothing said at the July 7 meeting dispelled their assumption.[FN31]
>
> Thus, by offering job applications and W-4 forms to Paving's employees on July 7, LLC invited the employees to accept employment without announcing its intention to set initial terms and conditions of employment. In these circumstances, we find, in agreement with the judge, that Respondent LLC is a "perfectly clear" successor to Respondent Paving and that Respondent LLC violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Teamsters and by failing to continue the terms and conditions maintained by Paving at the time of succession, i.e., the health and welfare and pension fund contributions in accord with terms of the expired 1998-2003 MRBA labor agreement[32]
>
> [32] See *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003); *Helnick Corp.*, 301 NLRB 128 fn. 1 (1991). We do not adopt the judge's finding that LLC violated Sec. 8(d), which provides, in relevant part, that "where there is in effect a collective-bargaining contract … no party to such contract shall terminate or modify such contract." Because LLC, as a successor, has no prior agreement with the Teamsters, it could not violate Sec. 8(d) by implementing terms and conditions of employment that varied from the predecessor's collective-bargaining agreement. See *U.S. Generating Co.*, 341 NLRB 1127, 1135 (2004).

In the present case, in June 2013, the FPS awarded Paragon a federal contract to provide guard services at the FEMA building in Washington, D.C., among other locations. Paragon was scheduled to take over operational control of the guard services at FEMA building effective September 1 replacing Knight, which had an existing CBA with the Union covering security officers working at the FEMA building and another facility effective for the period October 1, 2012 through September 30, 2015.

Baker, Paragon's vice president of operations, testified Paragon provides armed force protection to the federal government and the scope of Paragon's operations in the United States is 42 of the 50 states and many of the territories. Baker testified, if the predecessor contractor has a CBA, Paragon is bound by the wages and fringe benefits of that contract. He testified whatever

[9] In enforcing the Board's order in *Canteen,* the court stated, "In this case, Canteen instituted unilateral changes in the initial terms of employment by offering drastically reduced rates of pay to the predecessor's experienced employees without prior negotiation. The employees' refusal to accept employment was found by the ALJ and the Board to be a constructive denial of employment. We agree that Canteen's conduct was "inherently destructive" of the rights of those employees. As a result, *Canteen* had the burden of justifying its actions. See, *Canteen Corp. v. NLRB,* 103 F.3d 1355, 1366 (7th Cir. 1997).

[10] In *C.M.E., Inc.,* at 514–515, the Board held the respondent made it "perfectly clear" that it planned to retain all or substantially all of the employees in the unit as of February 25, and the obligation to bargain, including the setting or altering of initial terms of employment, commenced on that date rather than May 6, when the union subsequently made a formal request for recognition and bargaining.

the employees are making per hour, the health and welfare, vacation, vesting is all predetermined and is owed to the employees. Baker testified Paragon has to ensure when they go into a new contract that they are paying at least those collectively bargained minimums because those wages become the wage determination for the applicable contract and this is made clear by the contracting officers when they put out the solicitations on behalf of the federal agencies. Baker testified when they are interested in bidding for a contract most times Paragon receives a copy of the predecessor's CBA. Baker testified he reviews the predecessor's CBA wage appendices because that is what Paragon is required to meet, and that is how they determine what to put in the offer letter for wages. Baker testified, concerning the FEMA contract, Baker was responsible for ensuring they had enough people recruited, hired, trained, qualified, and ready to work on day one. Baker testified Paragon used Knight's CBA at the FEMA building to price out what Paragon was legally obligated to pay in terms of wages and fringe benefits. Baker testified there have been over 30 contract transitions to Paragon since the president's executive order pertaining to the right of first refusal of a job offer to the predecessor contractor's employees, with at least 15 in 2014. Baker testified there were two occasions in 2014 where less than 50 percent of the predecessor's employees came to Paragon on Federal contracts. He testified he did not recall it happening in 2013. Baker testified the vast majority of contracts in the last 2 years more than 50 percent of the predecessor's employees have been hired by Paragon making it through the vetting process and beginning work.

The parties stipulated that shortly after the FEMA Building federal contract was awarded to Paragon in June, Paragon arranged for a memorandum to be posted at the FEMA Building for incumbent Knight PSOs advising them Paragon was awarded the federal contract to begin providing guard services effective September 1, 2013 and inviting the incumbent PSOs to attend a job fair on June 29, 2013 at the Marriott hotel in Greenbelt, Maryland. The memorandum included the following:

> Paragon Systems is currently accepting applications from incumbent security officers. To be considered for employment, all candidates must complete all parts of the Paragon applications process.
>
> Applicants shall go to (listed website) or the company website (listed website) under careers and complete an online application.

The memorandum stated applicants must bring the following documents (the original and a copy) to the job fair. The documents listed included a driver's license or state ID, social security card, birth certificate, and high school diploma, transcript or GED certificate. The memo stated:

> Offers of employment are contingent upon successfully passing all pre-employment requirements, attending all scheduled training and passing all contract-required performance standards. A Medical exam, including a Fit Test and a drug screen is also required.
>
> Applicants will also be asked to provide availability times in order for the medical exam and the fit test to be scheduled.

Then Knight employee Birdsong learned Paragon was taking over the contract from Knight in the spring of 2013, through word of mouth, and he saw the memo from Paragon posted in the control room which announced Paragon's June 29 job fair. Birdsong estimated he saw the memo posted about a month before the job fair. Birdsong applied for employment with Paragon online as instructed by Paragon's job fair memo. Birdsong completed the online application in advance of the job fair. Birdsong received an email confirming he had submitted the application. Birdsong testified the online job application did not indicate anything was going to change concerning his working conditions. He testified the application said nothing about: the uniform allowance, paid or unpaid breaks, the length of breaks, how he would receive his health and welfare or pension contribution. It did not say how many hours were needed to be a full-time employee. Birdsong testified that at the time he applied he did not receive an employee handbook. He testified the email confirmation for the application did not contain any information regarding these matters. However, the application stated:

> If hired, I agree and understand that I will conform with the policies practices and procedures of Paragon. I further agree that my employment is "at-will." This means that either Paragon or I may terminate the employment relationship at any time, with or without notice, and with or without cause. I understand that Paragon retains the right to establish compensation benefits and working conditions for all of its employees. Accordingly, I understand and agree that Paragon retains the sole right to modify my compensation and benefits, position, duties, and other terms and conditions of employment, including the right to impose disciplinary action that Paragon, at its sole discretion, determines to be appropriate. No employee or representative of Paragon, other than the President of Paragon, Inc., has the authority to alter the at will nature of my employment relationship, or make any agreement inconsistent to the foregoing.

Birdsong attended the June 29 job fair at the Greenbelt, Marriott. Birdsong testified that, upon arriving at the job fair, he went to a desk and signed in and then he received a packet to be filled out. Birdsong testified he was directed to go inside the room where he completed his paperwork, which took about 20 minutes. He testified the packet contained tax forms, a direct deposit form, an offer letter, some EEO policy papers, and things of that nature. Birdsong testified there was a uniform sizing document in the packet. The offer letter in Birdsong's packet was dated June 29, and has his name on it. The offer letter stated, in part, "On behalf of Paragon Systems, I would like to extend to you a contingent offer of employment to serve as a Security Officer. . . ." "Effective date of this offer is September 1, 2013." The offer letter, including listing certain terms of employment, stated "Employment is contingent upon successfully passing all pre-employment requirements (including pre-employment interviews), attending all scheduled training, weapons qualification, and passing all contract-required performance standards including the physical exam with a physical abilities test. A pre-employment drug screen is also required." The offer letters distributed by Paragon on June 29, contained the same information to all of the Knight employees who received one. Birdsong testified he read and signed the offer letter and turned it in to Paragon officials on June 29.

Birdsong testified that when they completed filling out their hiring packets received on June 29 at the Marriott, the officers waited to be called up front. Then Birdsong met with a man at the table and Birdsong provided him with his hiring packet, social security card, birth certificate, driver's license, and a blank voided check for them to make direct deposits of his pay. Birdsong testified he submitted qualifications including certificates of training that he had. Birdsong testified he met with the person at the table for about 20 to 25 minutes, and then he left. Birdsong testified that he was told at the table there would be an orientation soon, and it would be announced. Birdsong testified the man at the table did not ask him any questions about his professional or educational background. He did not inquire why Birdsong was interested in working at Paragon. Birdsong testified when he left the Greenbelt Marriott on June 29, he was under the impression he had been hired. This was because he had signed the offer letter as instructed, and they said based on what was in his packet he had everything and he was good to go.

Similarly, Baker testified when someone comes to a job fair if they are an incumbent they check in and if they have applied in Paragon's system it is likely Paragon has an application and a packet for them which includes a contingent offer letter. He testified Paragon will ask them for their paper work. Baker testified for the incumbent workforce Paragon has their credentials and knows they are an officer in good standing on the current contract. For the incumbent officer, they come in and receive their packet with their offer letter, benefit paperwork, the I-9 form, direct deposit forms, benefits explanation forms, and all of the information needed to be put into Paragon's system. Baker testified the offer letter is on top in the file and the first thing the incumbent sees. Baker testified this is the procedure for all job fairs.

Baker testified that, after the job fair is completed, then the predecessor's incumbents have to qualify for the new contract. To qualify, they have to go through use of force training with Paragon, which pertains to the use of their firearm. He testified, if they had OC training or if they had baton certification which is expired, they have to go through that use of force training with Paragon. Baker testified Paragon does its own use of force training. He testified they have to go for new medical testing. He testified the medical requirements from the old contract to the new one had changed at FEMA. The new one required a seven-panel urinalysis as opposed to a five panel. They also had to be sized for uniforms and for body armor, which was a new requirement. Then they are sent for the fit testing which is not only the medical testing, but also a cardiovascular test.

Baker testified Paragon wants the officers to complete the applications before coming to the job fair because, "We can't issue contingent offers of employment until you've applied, officially applied with the company unless you express interest, and everybody who works for Paragon from top to bottom has to apply online through our HMS system before being considered for positions." He testified Paragon wants people to apply in advance of the job fair to know who is coming to the fair, and how much support personnel Paragon will need at the meeting. Baker testified Paragon's job fair memo asks people to bring certain documents. Baker testified they present themselves with their social security card, they fill out I-9s, and they provide their driver's license data. Baker testified the job fair announcement memo states offers of employment are contingent upon successful passing of all the pre-employment requirements. Baker testified contingent means, "we're giving you an offer, but it's not a guarantee of employment on September 1st. That's just the first part of the process. We're giving you a contingent offer of employment meaning if you meet all the terms and conditions, if you accept our employment, and if you qualify with all the bona fides that I explained earlier for your training, your medical certifications, et cetera, then essentially you'll have a place to work on 1 September." Baker testified the job fair memo is not an offer of employment. He testified "an offer of employment is an offer letter. This is just how to go and apply for a job with us."

The General Counsel argues that Paragon's early June memo announcing the job fair was an invitation for incumbent employees to apply for continued employment at the FEMA buildings and constituted or was tantamount to an invitation to accept employment under *Spruce Up*. The General Counsel contends that because Paragon failed to announce its intent to establish new terms and conditions before it issued this memo and made applications available, it was a "perfectly clear successor, and it violated Section 8(a)(5) by subsequently making all of the alleged unilateral changes to employees terms and conditions of employment. In support of this contention the General Counsel notes that the June memo invited the Knight employees to apply, told them how to apply, and directed them to bring documents including an original and copy of their driver's license, birth certificate, Social Security card, and high school diploma to a scheduled job fair. It is pointed out that nothing in the memo indicated Paragon would be setting terms different than those contained in the Knight CBA. It is asserted that the documents requested most often are tendered after an employment decision is made. The General Counsel argues that Paragon's employment application also failed to announce its intention to set different terms of employment. The General Counsel argues, in the circumstances, here that the fact Paragon had not extended formal offers of employment at the time it issued the job fair member does not negate a finding of a perfectly clear successor. It is asserted that is particularly so here where Paragon was legally obligated to offer employment to its predecessor's employees under the president's executive order.

For the reasons state above as advanced by the General Counsel I find that Paragon was a perfectly clear successor to Knight at the time it posted its job fair memo, solicited incumbent employees to apply, and requested them to bring the above listed employment related documents to what it described as a job fair. As Baker's testimony revealed the on line application was needed to input Knight's employees into Paragon's system and the completion of that application was sufficient for Paragon to generate an offer letter for each Knight employee who applied, and then at the meeting they were asked to sign additional employment related forms, and provide information for them to be fitted for body armor and uniform sizing. Since the completion of the online application was sufficient to generate an offer letter, it clear that Paragon had exhibited a fixed intent to hire the employees who applied, as it was required to do by the President's executive order. This conclusion is bolstered by Birdsong's

credited testimony that he was not interviewed by Paragon's officials for the position aside from their determining his employment related documents were in order. As well as Baker's testimony that he was responsible to have the project fully staffed by the September 1 start date.

Thus, I find that at the time Paragon solicited applications in the circumstances here it established itself as a perfectly clear successor, and by its failure to clearly announce that it intended to establish a new set of working conditions at the time it invited employees to apply, and thereafter unilaterally changing those conditions it violated Section 8(a)(5) and (1) of the Act. See *Hilton's Environmental, Inc.,* 320 NLRB 437, 438 (1995); *Canteen Co.,* 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997); *Fremont Ford,* 289 NLRB 1290, 1296–1297 (1988); *Elf Atochem North America, Inc.,* 339 NLRB 796, 808 (2003); *DuPont Dow Elastomers, LLC,* 332 NLRB 1071, 1073–1074 (2000); *Helnick Corp,* 301 NLRB 128, 134 (1991); *Turnbull Enterprises,* 259 NLRB 934, 938–-940 (1982); and *CME, Inc.,* 225 NLRB 514 (1976). I do not find that Paragon would logically expect a majority Knight's work force which were staffing the federal building would have failed to pass the necessary exams and medical requirements to retain their positions with Paragon. See *Road & Rail Services,* 348 NLRB 1160, 1169–1170 (2006). This is confirmed by Baker's testimony that in the vast majority of its contracts it hires a majority of the predecessors work force.

Moreover, the equities here way heavily in favor of finding a perfectly clear successor, given the back drop of the executive order according these employees a right of first refusal to a position with Paragon concerning their prior positions with Knight at the FEMA location. First, Respondent posted its job fair memo in early June inviting them to a job fair on June 29, and instructing them to fill out an on line application in advance of the job fair and to bring several employment related documents generally tendered to a new employer. The job fair memo gave no indication that the employees benefits at Paragon would change from those at Knight. Moreover, while Brady's testimony indicated that in the large majority of instances Paragon retained a majority of the predecessor's employees, no notice was provided to the Union that Paragon intended to change these employees benefits. These actions by Paragon had several adverse effects on the Knight employees. First, the time spent time filling out applications and traveling to the job fair without warning that their benefits would change. Second, they could have been misled to delaying seeking alternate employment which they may have done had they been provided with that information at the outset including the particulars of the benefit changes. See *Machinists v. NLRB,* 595 F.2d 664, 674–675 fn. 49 (D.C. Cir. 1978), where the court stated "Even when *Burns* is read, as the Board does, to limit compulsory initial-terms bargaining to situations wherein the successor has indicated that incumbents will be retained and has not concurrently announced downward changes in employment terms, predecessor-employees are afforded an important measure of protection. Once the duty to bargain has thus attached, the successor is obliged to consult the incumbent union before institution of less satisfactory terms. That is significant because unconditional retention-announcements engender expectations, oft times critical to employees, that prevailing employment arrangements will remain essentially unaltered. Even when incumbents are not affirmatively led to believe that existing terms will be continued, unless they are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force." There the court noted even when the employment offer and subsequent announcement of changed terms both occur before the actual hiring, a duty to bargain with respect to the proposed changes could possibly be imposed on either of two grounds; for lack of sufficient time to rearrange their affairs, incumbents might be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms, and even were that less plain, a bargaining obligation may be essential to protect the employees from imposition resulting from lack of prompt notice. "Thus a prospective employment relationship may be presumed when a successor has boldly declared an intention to retain incumbents but has not concurrently proposed substantially reduced benefits. And such an inference may be left undisturbed by revelation of employment terms after the employer's initial announcement but before actual hiring commences. The successor would have no legitimate complaint about mandatory bargaining in such circumstances because its necessity is a product of his own misleading conduct."

I also find that while, as set forth above, Respondent's bargaining obligation accrued when it solicited the predecessor employees to apply, that under Board law statements in the Respondent's employment applications that they would be hired as at will employees and wherein Respondent it reserved unto itself the right to change benefits, but did not state it would do so, or list any specific benefit changes also amounted to a failure to give the applicants sufficient information to alter Respondent's status as a perfectly clear successor.[11] See *Windsor Convalescent Center of North Long Beach,* 351 NLRB 975, 980–981 (2007), enf. denied in relevant part 570 F.3d 354 (D.C. Cir. 2009),[12] where the Board majority found that even assuming the respondent informed applicants that they would only be employed on a temporary basis, that as a result they were not eligible for certain benefits, and that other terms and conditions would be set forth in personnel policies in a subsequently issued handbook the Board found the respondent was nevertheless a perfectly clear successor because the respondent failed announce its intent to establish a new set of conditions prior to inviting the employees to accept employment. In *Windsor Convalescent Center of*

[11] I make this finding only should a reviewing authority disagree with my prior analysis, because I have previously found Respondent's bargaining obligation affixed when it solicited the employees to apply, and for the reasons stated subsequent conduct would not alter that obligation.

[12] The Board majority *Paragon Systems, Inc.,* 362 NLRB No. 166, slip op. at 3 fns. 6, 7 (2015), distinguished but did not overrule *Windsor Convalescent Center of North Long Beach,* supra. In *Paragon,* supra, the Board pointed out that in *Windsor* the Board had found the respondent to be a "perfectly clear" successor, which as pointed out by the ALJ in *Paragon* was not being alleged against Paragon in that litigation. See, *Paragon* at pages 6 to 7. Since the General Counsel has taken the position that Paragon is a perfectly clear successor in the current case a separate set of issues and parameters are raised here.

North Long Beach, at 981, the Board majority stated, "there is no evidence that the Respondent, prior to the takeover, informed Candlewood employees that those who were retained would be working under different core terms and conditions of employment. On this record, we find that the Respondent 'failed to clearly announce its intent to establish a new set of conditions prior to inviting former [Candlewood] employees to accept employment.'" See also, *Canteen Co.,* 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), where the Board found an employer to be a perfectly clear successor, although it had informed the union that it wanted the predecessor's employees to serve a probationary period. It is commonly known that employees serving a probationary period are considered to be akin to employees at will during that period.

The court in *S & F Market Street Healthcare LLC v. NLRB,* 570 F.3d 354, 359–362 (D.C. Cir. 2009),[13] in reversing the Board in *Windsor Convalescent*, supra and concluding that the respondent employer was not a perfectly clear successor, stated as follows:

> On the undisputed facts of this case, no employee could have failed to understand that significant changes were afoot. The cover letter attached to each job application foretold "significant operational changes," identified various pre-employment checks and tests to be passed, and explained that any employment offered would be both temporary and at will. The Board discounted the cover letter on the ground that it "lacked any mention of intended changes to employees' terms and conditions of employment." Id. at 981. Yet under Candlewood's collective-bargaining agreements with the Union, as any employee would know, each employee with 90 days on the job had vested "seniority rights" and could not be terminated except for cause, which the Union could contest through the negotiated grievance and arbitration procedure. By announcing that any employment with S & F would be at will, therefore, S & F was announcing a very significant change in the terms and conditions of employment-both for those who had been employed by Candlewood for 90 days or more and for those who expected to be. In addition, by requiring its new employees to agree to its own alternative dispute resolution policy, S & F made it clear the grievance mechanism the Union had negotiated with Candlewood would not be available.
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> Nevertheless, the Board concluded "there is no evidence that [S & F], prior to the takeover, informed Candlewood employees that those who were retained would be working under different core terms and conditions of employment." 351 N.L.R.B. at 981. We see two errors of law in this restatement of the "perfectly clear" standard.
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> First, the focus upon "core" terms and conditions misstates the rule, which is that the successor employer must simply convey its intention to set its own terms and conditions rather than adopt those of the previous employer. Granting that a trivial change in employment conditions may not suffice, there is no requirement in *Burns* or *Spruce Up* that the intended change(s) involve "core" terms. Whatever that term may mean, however, it surely includes instituting at-will employment and eliminating the negotiated grievance and arbitration procedure.
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> Second, the Board's holding achieves precisely what *Burns* and *Spruce Up* sought to avoid. In those cases the Supreme Court and the Board respectively started from the presumption that a successor employer may set its own terms and conditions of employment and reserved the "perfectly clear" exception for cases in which employees had been misled into believing their terms and conditions would continue unchanged. *See Burns,* 406 U.S. at 294-95, 92 S.Ct. 1571; *Spruce Up,* 209 N.L.R.B. at 19. In this case, the Board presumed the predecessor's terms and conditions must remain in effect unless the successor employer specifically announces it will change "core" terms and conditions. Thus does the exception in *Burns* swallow the rule in *Burns.* Under the proper standard, S & F clearly comes within the protection of the rule rather than the straightjacket of the exception: It was never "perfectly clear that the new employer plan[ned] to retain all of the employees in the unit," *Burns,* 406 U.S. at 294–[2]95, 92 S.Ct. 1571, let alone that it did so "with no notice that they would be expected to work under new and different terms," *Spruce Up,* 209 N.L.R.B. at 195 n. 7. On the contrary, the Company announced it would retain only those who met certain preemployment tests and stated its intent to set new initial terms and conditions of employment.

Since I find that Paragon's bargaining obligation with the Union attached at the time Paragon solicited the predecessor employees to apply; which predates the time of the employees' actual applications and any statements contained therein, this case is distinguishable from the court's decision in *S & F Market Street Healthcare LLC v. NLRB,* 570 F.3d 354 (D.C. Cir. 2009). However, this case is also distinguishable from *S & F Market* in other significant ways. There, as reported by the court, the respondent employer purchased the predecessor, and prior to assuming control concluded it would need to increase the level of care and replace the staff. It then decided closer to its July 1 takeover that it could not replace the entire staff because doing so would be too disruptive to the residents. Rather, it decided to hire some of the predecessor's employees for up to 90 days, while it continued to recruit new employees. When in June it had applications distributed to existing staff it included a cover sheet stating that it intended to implement significant operational changes and current employees must submit the attached application for employment. It advised that only employees who meet the company's operational needs will be interviewed and any offer of employment will be contingent on your passing a pre-employment physical, drug test and acceptable reference and background checks. The court noted the job application itself required the applicant to affirm their understanding that passing the tests and checks was a condition of employment, that any

[13] While the court in *S & F Market Street Healthcare LLC* reversed the Board's perfectly clear successor finding in Windsor Convalescent Center of North Long Beach, and disagreed with the Board's "core terms and conditions" requirement, I am required to follow Board precedent, not reversed by the Supreme Court. See *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

employment would be at will, and that S & F could change benefits, policies at any time. During subsequent interviews at the end of June, each employee who submitted an application was interviewed; and each applicant was informed their employment would be temporary and would last no more than 90 days. The employees who were accepted were sent a letter dated June 30, stating it was an offer of temporary employment; that as a temporary employee they were not eligible for company benefits, and that other terms of your employment will be set forth in the respondents' personnel policies and its employee handbook. It stated their employment was at will and would end no later than the expiration of the 90 day period, unless they were selected for regular employment. Those hired also had to sign an agreement to be bound by an alternative dispute resolution policy. Within the first 3 months of operation the successor had replaced a majority of those hired from the predecessor's staff with new employees.

In the current case, Paragon's intent to hire and retain the predecessor employees is clear, as it was required to offer employment to those employees under the existing executive order. There is no claim that this was done on a temporary basis, or that the employees were informed of such. In fact, all the employees had to do was apply on line which engendered their being given an offer letter at the June 29 job fair, and I have concluded that the offer letter was proffered with no substantive job interview other than their submitting the requisite paper work at the job fair. Along these lines, it was the purpose of the executive order that "the Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover work force minimizes disruption in the delivery of services during a period of transition between contractors and provides the Federal Government the benefit of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements." In this regard, Baker testified when someone comes to a job fair if they are an incumbent they check in and if they have applied in Paragon's system it is likely Paragon has an application and a packet for them which includes a contingent offer letter. He testified Paragon will ask them for their paper work. Baker testified for the incumbent work force, Paragon has their credentials and knows to that point they are an officer in good standing on the current contract. Baker testified that at the job fair once they were done filling out the information, they were called up to have the paperwork reviewed and went through the interview process with attending Paragon representatives. Baker testified when they turned in the paper work they had to complete their uniform size survey and give Paragon their measurements. Baker testified Paragon had people with a tape there who would did a fitting for the officers' body armor. Baker testified they were told they would be instructed as to when the next range dates would be, when the training dates would be, and this would be communicated through their site manager. There was no contention that any of the predecessor employees who applied had their applications rejected at the job fair. This, along with job fair announcement requiring the incumbent applicants to bring several employment related documents to the job reveals Respondent had a fixed intent prior to their arrival to offer them positions, as it was required to do under the executive order.

Baker testified that, after the job fair is completed, the predecessor's incumbents have to qualify for the new contract. To qualify, they have to go through use of force training with Paragon, which pertains to the use of their firearm. He testified, if they had OC training or if they had baton certification which is expired, they have to go through that use of force training with Paragon. Baker testified they have to go for new medical testing. He testified the medical requirements from the old contract to the new one had changed at FEMA in that the applicants were now required to pass a seven-panel urinalysis as opposed to a five panel. Thus, Baker's testimony reveals these employees had to meet similar requirements in terms of training and testing to be employed by the predecessor employer; and that Respondent's testing and examination requirements were essentially status quo requirements which would not signal to these employees that Respondent was going to change their wages and benefits. In this regard, Baker testified that for the vast majority of these contracts Respondent hires over 50% of the predecessor employees, and that 90% of Respondent's employees are union represented. There was no claim that a significant number of the predecessor's employees here failed Respondent's testing requirements, or in fact that any of them did so. This point is somewhat conceded in Respondent's brief because they contend they did not offer the incumbent PSOs employment until Respondents gave them their offer letters. However, those offer letters were contingent on passing Respondent's testing requirements. Thus, unlike *S & F Market,* I have concluded based on the cases cited and for the reasons mentioned that Respondent's bargaining obligation with the Union attached when Respondent solicited the predecessor employees to apply, which predated their applications. Moreover, I find the terms set forth in the applications when subsequently reviewed did not signal to these employees that Respondent intended to change their wages, hours, and benefits.

The court noted in *S & F Market* that the Board did not explain its "core terms and conditions of employment" reference in *Windsor Convalescent Center* and for the reasons stated by the court drew a different result than that reached by the Board. While I cannot speak for the Board, I note that in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198–201 (1991), the Court held that a post contract layoff dispute not arising under the terms of the contract was not arbitrable, under the expired arbitration clause. In this regard, the Court stated that:

> The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment. See *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230 (1962). In *Katz* the union was newly certified and the parties had yet to reach an initial agreement. The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations on a new one have yet to be completed. See, e.g., *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 544, n. 6, 108 S.Ct. 830, 833, n. 6, 98 L.Ed.2d 936 (1988).
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> Numerous terms and conditions of employment have been held to be the subject of mandatory bargaining under

the NLRA. See generally 1 C. Morris, The Developing Labor Law 772–844 (2d ed. 1983).

. . .

In *Hilton–Davis Chemical Co.,* 185 N.L.R.B. 241 (1970), the Board determined that arbitration clauses are excluded from the prohibition on unilateral changes, reasoning that the commitment to arbitrate is a "voluntary surrender of the right of final decision which Congress . . . reserved to [the] parties. . . . [A]rbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." Id*.,* at 242. The Board further relied upon our statements acknowledging the basic federal labor policy that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). See also 29 U.S.C. § 173(d) (phrased in terms of parties' agreed-upon method of dispute resolution under an *existing* bargaining agreement). Since *Hilton–Davis,* the Board has adhered to the view that an arbitration clause does not, by operation of the NLRA as interpreted in *Katz,* continue in effect after expiration of a collective-bargaining agreement.

. . .

We think the Board's decision in *Hilton–Davis Chemical Co.* is both rational and consistent with the Act. The rule is grounded in the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration. See *Indiana & Michigan, supra,* at 57–58; *Hilton–Davis Chemical Co., supra.* The rule conforms with our statement that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 374, 94 S.Ct. 629, 635, 38 L.Ed.2d 583 (1974). We reaffirm today that under the NLRA arbitration is a matter of consent, and that it will not be imposed upon parties beyond the scope of their agreement.

In *Finley Hospital*, 359 NLRB 156, 157–158 (2012), the Board majority stated:

The declared policy of the Act, as stated in Section 1, is to "encourage [e] the practice and procedure of collective bargaining" and to protect the "full freedom" of workers in the selection of bargaining representatives of their own choice. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Because it is critically important that collective bargaining be meaningful, it has long been established that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative prior notice and a meaningful opportunity to bargain about the changes. *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Under this rule, an employer's obligation to refrain from unilaterally changing these mandatory subjects of bargaining applies both where a union is newly certified and the parties have yet to reach an initial agreement, as in *Katz*, and where the parties' existing agreement has expired and negotiations have yet to result in a subsequent agreement, as in this case. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). In the latter circumstances, an employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new agreement or bargain to a lawful impasse. Id . at 198–199.

The Supreme Court's decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), rendered the Board's decision in *Finley Hospital*, 359 NLRB 156, 157–158 (2012) invalid. However, in *Finley Hospital,* 362 NLRB No. 102 (2015), a Board majority subsequently affirmed the ruling finding an unlawful unilateral change concerning the discontinuance of a contractually established wage increase following the expiration of the collective-bargaining agreement. The Board stated, "even without a contractual obligation, the employer still has a duty to bargain under Section 8(a)(5). That duty requires that the employer not make changes to existing terms and conditions of employment without satisfying its statutory bargaining obligation. Changes may be made if the employer notifies the union and bargains new terms--or if the parties bargain and reach a lawful impasse. See, e.g., *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1036–1038 fn. 6 (2003), review denied 381 F.3d 767 (8th Cir. 2004). When the employer ignores its statutory duty to bargain and makes changes unilaterally, it is bypassing the union and depriving its employees of their right to be represented in bargaining over their terms and conditions of employment."

As noted from the above discourse, unless certain circumstances exist from an expired CBA, or the dispute arose under the prior contract, arbitration does not survive the expired CBA during contractual hiatus periods. Ergo discipline taking place following the expiration of a CBA would not ordinarily be arbitrable, bringing that type of discipline more akin to termination at will; and differentiating it from the core conditions of employment such as wages, hours, and fringe benefits for which it is commonly known must be bargained to impasse with a newly certified union or following the expiration of a CBA before an employer can make changes to those aspects of employees working conditions. Given this differentiation by the Court and the Board, the average employee might not so readily conclude that a successor employer by merely stating their employment would be at will standing alone would signify to that employee that the successor employer was planning to make changes to their wages, hours or working conditions when they were hired.[14] In

[14] Of course, it is even an open question as to whether an employer with an obligation to recognize and bargain with a union, even absent a collective-bargaining agreement, could terminate an employee "at will" that is without prior consultation with the employee's collective-bargaining representative. See, *Alan Richey, Inc.,* 359 NLRB No. 40 (2012), rendered invalid by the Court's decision in *NLRB v. Noel Canning,* 134 S.C. 2550 (2014).

fact, to accept such a stance would allow every "perfectly clear" successor to eviscerate its bargaining obligation set forth by the Court in *Burns* by the use of two words, "at will." The Board in *Sahara Las Vegas Corp.*, 284 NLRB 337, 343 (1987), enfd. 886 F.2d 1320 (9th Cir. 1989), rejected a similar attempt by a successor employer when it attempted to label the predecessor work force it hired as probationary employees in an effort to delay its bargaining obligation. There, the ALJ stated, with Board approval, that:

> [T]he Respondent has shown no special circumstances here warranting the postponement of that obligation. The probationary period imposed by the Respondent comes across on this record as little other than a meaningless device having no discernible impact on employee tenure or the Respondent's staffing plans which, for all that's shown here, were complete as of August 20. For this reason, I am at a complete loss to comprehend what policy under the Act would be served to accord the sweeping effect the Respondent desires here to the probationary period. Indeed, the Respondent's argument on this point is so lacking in merit when weighed against the existing case law that I am compelled to look elsewhere for an explanation of its refusal to adhere to its legal obligations. That explanation is, in my judgment, fully explained in Lewis' testimony, noted above, the essence of which is that the Respondent intended to retain complete unilateral control over its casino employees consistent with the historical pattern of this industry in Las Vegas.

While the Respondent here labeled the employees as "at will" in its employment application, I find from the beginning Respondent intended to hire these skilled and trained employees, did hire them, and as the record shows retained the majority of them at the time they were hired. I find that the use of "at will" and similar terminology in Respondent's employment application as was the case in *Sahara Las Vegas Corp,* would be little more than a device to enable sophisticated employers to terminate their initial bargaining obligation as "perfectly clear" successor employers, as had been Respondents' practice when they had taken over other prior government contracts.[15]

Moreover, the Court stated in *NLRB v. Burns Security Services*, 406 US 272, 280, 281 (1972), that "It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed." However, the Court went on to state, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." The reduction in wages and benefits was impliedly viewed differently by the Court then the requirement that a successor be strictly bound by the predecessor's CBA, or the grievance-arbitration procedure contained therein. See also, *DuPont Dow Elastomers, LLC,* 332 NLRB 1071, 1073–1074, 1074 fn. 7 (2000), enfd. 296 F.3d 495 (6th Cir. 2002), where a perfectly clear successor was found where the unions there were informed that although the successor employer would not honor the predecessors CBA's it would maintain employees' wages and benefits under those contracts. In *Bellingham Frozen Foods, Inc.,* 626 F.2d 674, 678–679, fn.1 (9th Cir. 1980), the court stated "When it is 'perfectly clear' that the employer intends to hire a majority of his workforce in a unit represented by a union from the ranks of his predecessor, his duty to bargain commences immediately." However, citing *Burns,* the court stated the obligation is to recognize and bargain with the union, but it is not bound to the substantive terms of the predecessor's CBA not agreed to or assumed by it. Similarly, in Cadillac Asphalt Paving, 349 NLRB 6, 10-11 fn. 32 (2007), the Board found the respondent was a perfectly clear successor that violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union and by failing to continue the terms and conditions maintained by the predecessor at the time of succession, i.e., the health and welfare and pension fund contributions in accord with terms of the expired 1998-2003 MRBA labor agreement, but that the respondent did not violate Section 8(d) of the Act by implementing terms and conditions of employment that varied from the predecessor's collective-bargaining agreement. In this regard, the Board has found a successor employer to be a perfectly clear successor, although it had informed the union there that it wanted the predecessor's employees to serve a probationary period. See *Canteen Co*., supra. Thus, it would not seem informing employees their employment would be at will would necessarily constitute a signal to those employees that an employer intended to change their wages, hours, and fringe benefits.

While I find Paragon's bargaining obligation with the Union attached at the time they solicited the predecessor employees to apply; which predates the time of the employees' actual applications, I also find the applications themselves further confirmed the Respondents intent to hire and did not specifically apprise the employees that there would be a change or reduction in wages or benefits. In reaching this conclusion, I have considered the fact that the application stated the applicants employment would be "at-will" and that Paragon retained the right to establish compensation, benefits and working conditions for all of its employees; and the right to modify my compensation and benefits, position, duties, and other terms and conditions of employment, including the right to impose disciplinary action that Paragon, at its sole discretion, determines to be appropriate. It also stated that "No employee or representative of Paragon, other than the President of Paragon, Inc. has the authority to alter the at will nature of my employment relationship, or make any agreement inconsistent to the foregoing." While the Paragon application stated that Paragon retained the right to establish compensation and benefits, it did not state Paragon planned to exercise that right, nor apprise

[15] For example, Paragon's reference in its employment application that "No employee or representative of Paragon, other than the President of Paragon, Inc. has the authority to alter the at will nature of my employment relationship, or make any agreement inconsistent to the foregoing," can be construed as a response to offset a possible fact pattern as set forth by the court in *S & F Market Street Healthcare LLC v. NLRB,* supra, where there were alleged statements by supervisors offsetting the successor employer's employment related documents.

employees of what changes, if any, Paragon intended to make.[16]

In this regard, Birdsong credibly testified the online job application did not indicate anything was going to change concerning his working conditions. He testified the application said nothing about: the uniform allowance, paid or unpaid breaks, the length of breaks, how he would receive his health and welfare or pension contribution. It did not say how many hours were needed to be a full-time employee. Birdsong testified that at the time he applied he did not receive an employee handbook. He testified the email confirmation for the application did not contain any information regarding these matters. Birdsong's testimony is supported by the fact that there is no claim by Birdsong or Baker that the "at will" reference drew any questions by any employees to Respondent's officials. Yet, at the June 29 job fair when the employees received an offer letter which reported an incorrect pay rate, Birdsong testified the officers wanted to know whether Paragon was going to honor their CBA because their pay was higher than that in the surrounding areas. Birdsong testified that he as well as others asked this question stating this was the main concern. Similarly, Birdsong testified that at the August 24 orientation, questions continued as to whether Paragon was going to pay them the same pay they had been receiving with the prior company because they had a CBA in place, and they wanted to know if Paragon would honor the CBA and pay them their rate of pay because when they signed the offer letter it was lower, and the employees were concerned Paragon was going to drop their pay. Birdsong testified Waddell also talked about vacation pay, and he was asked questions about health and welfare. Waddell was asked if they were going to be receiving their health and welfare as a wage and he said no. Waddell said it would be going to the benefit plan. During the orientation Waddell also said they would no longer be receiving the pension contribution as a wage that it would go into the 401(k) plan. Thus, the ambiguous language in the application drew no questions about benefit changes, signifying that the employees did not understand the application language to be a notice of change of benefits, or it surely would have caused them to raise questions to management as to what those benefit changes would be. Rather, it was only after Respondent announced specific benefit changes in its June 29 offer letter did employees raised questions about the announced changes. Significantly, the employees did not question Respondent's officials at that time about any changes that were not specifically announced. Confirming Birdsong's testimony that he did not expect such changes and only learned of them after he began working for Respondent.

Here, the equities also favor the Union's claim. The record reveals that during its June 29 job fair Paragon passed out of letters to incumbent employees stating employees were being extended a contingent offer of employment with an effective date of September 1. Included in the letter was the statement, "Shift schedules will be determined in accordance with the operational needs of the contract. Breaks will be provided in accordance with Company policy and in compliance with any applicable State and Federal law requirements and subject to the operational needs of the contract." Birdsong credibly testified the employees had no clue from this language that breaks were going to change. Birdsong credibly testified that where it states in the offer letter that, "Breaks will be provided in accordance with company policy," did not signify to him there was going to be a change because Paragon's break policy could have been the same as that with Knight. Birdsong's testimony is buttressed by Brady's admission that some of the supervisors at Paragon did not know that employees were not to be paid for their lunch breaks until after Paragon began operations. So while working for Knight the officers would receive 40 hours pay when their shift was scheduled for 40 hours, for Paragon they only received 37-1/2 hours pay for the same 40 hours. While Paragon's June 29 offer letter detailed vacations for what it said were full-time employees, it did not define what a full-time employee was at the time. Moreover, the definition of full-time employee in the Knight CBA was someone working 32 hours per week. It was not until August 24, at an orientation meeting that the employees received a hard copy of Paragon's multi page handbook which contained an isolated statement that full-time employees were those working a 40 hour week. Yet, in order to qualify for employment with Paragon, its June 29 offer letter stated the officers had to accept Paragon's offer by July 6. Thus, the employees prior to being required to accept Paragon's offer were not told what the true changes to their vacations would be, or even what vacations or sick leave were to be accorded those considered part time. This conclusion is bolstered by Birdsong and Fraser's credited testimony that the employees did not detect their diminished vacation and sick leave until months after they began employment with

[16] While in *Paragon Systems, Inc.,* 362 NLRB No. 166 (2015), the Board majority accepted language similar to the language in the Paragon's application there are differences here. First, *Paragon Systems, Inc.,* did not involve the issue of whether Paragon was a perfectly clear successor, as is raised in the current case. Moreover, although I have found Respondent's perfectly clear successor status was perfected prior to the predecessor employees receiving their offer letters, the June 29 offer letters stated, "Shift schedules will be determined in accordance with the operation need of the contract with consideration given to employee seniority. Breaks will be provided in accordance with Company policy and in compliance with any applicable State and Federal law requirements and subject to the operational needs of the contract." While, some may say the employees should have been be able to predict in advance from this ambiguous language that Respondent was going to cease paying the employees for their theretofore compensated 30 minute lunch break as the Board majority found with respect to guard mount breaks in *Paragon Systems,* the facts are different here because not all of Respondent's supervisory staff had same ability to divine such a policy change. In this regard, Birdsong testified when Paragon took over operations on September 1, his breaks did not change initially. He testified the break structure changed around a month after Paragon took over, and he was paid for his 30 minute lunch break by Paragon until that time. Even Baker admitted some employees continued to be paid for their 30 minute lunch break after the transition to Paragon, explaining some supervisors continued to put them in for the breaks, although he claimed this was for a shorter period for which Birdsong testified. While the actual records were not placed in evidence, it is more likely Birdsong gave the more accurate account since the change directly affected his earnings. Thus, the Board has more information here that not only was there credible testimony from an employee that he did not expect benefit changes from Respondent's statements, Respondents actions in continuing to pay some of the employees for these breaks reveal some of its supervisory staff drew the same conclusions as did the employee.

Paragon. The same can be said about Paragon's termination of Knight's dry cleaning allowance for employees' uniforms which was only vaguely disclosed to the officers on August 24 when they first received a hard copy of Paragon's handbook. Here again, there was more ambiguity as the handbook did not tell them specifically they would not be getting the allowance, because even if they read and understood the handbook provision, there is no contention at that time whether they were told the types of uniforms they would be receiving as it pertained to the handbook explanation. Thus, Paragon misstated benefits i.e. wage rates, health and welfare, and pension in its offer letter, and gave information as to benefit cuts over time in a piece meal fashion to employees. Since Paragon had a copy of the Knight CBA prior to its June job fair posting, I can only conclude that the way it notified and obfuscated its benefit package to employees was done intentionally to giving them a false sense of security as to their terms and conditions of employment should they work for Paragon.[17] I find this was done to help persuade the employees to accept employment to allow Paragon to meet its staffing goals, which also supports my conclusion that Paragon should be found to be a perfectly clear successor and that it has violated Section 8(a)(5) and (1) of the Act by the unilateral changes allege in the complaint.

I have rejected Respondent's contention in its brief that its June 29 job fair memo was merely an invitation for employees to submit applications that under *Spruce Up* the time when a successor employer must announce an intent to change terms and condition of employment is prior to or simultaneously with an invitation of the prior work force to accept employment. It asserts in the present case the easily identifiable point at which Paragon offered employment to the incumbent employees was June 29, when they received their personalized offer letters at the job fair meeting. For the reasons stated and the case law cited, I find Respondent's bargaining obligation attached in early June with the publication of its job fair memo. Since I find the bargaining obligation attached with the job fair memo, my conclusions render a nullity Respondent's contention that its June offer letter unambiguously announces that things were going to be different than under what took place with Knight. I also do not find that cases such as *Ridgewell's, Inc.*, 334 NLRB 37 (2001), enfd. 38 Fed.Appx. 29 (D.C. Cir. 2002), support Paragon's position here. In *Ridgewell's* the respondent employer met with a union prior to the employer even obtaining the applicable subcontract, and informed the union that it would use the predecessors employees as independent contractors, and the Board held that was sufficient to place the union on notice that those employees would not be hired under the terms of the predecessors CBA. That is different than the circumstances here where Paragon made no such announcement to the union but through a general announcement solicited all of the predecessors employees to apply, was legally obligated to offer them employment, and by that solicitation I have concluded demonstrated a fixed intent to employ them without announcing it would have changed the terms of their employment. Similarly, in *Resco Products*, 331 NLRB 1546 (2000), the successor employer's first contact with the predecessors employees included an offer of employment including terms different than that for which they worked under the predecessor. In the instant case, Paragon's first contact with Knight's employees was its job fair memo in which it solicited their employment applications but failed to inform them of any differing terms.

Here, Paragon in early June published a job fair memo inviting employees to apply for work on line, and asked them to attend a job fair on June 29, notifying them they were to bring certain employment related documents, and their duplicates. Yet, prior to this announcement, Paragon had had in its possession a copy of Knight's CBA, but it failed to inform the employees or their union that Paragon intended to make changes in that CBA if they accepted employment with Paragon. At the June 29, job fair Paragon provided employees with a "contingent" offer letter, which it allowed the employees to sign and tender to Paragon on that date, which Birdsong did, which also gave them a deadline of July 6, to tender acceptance of that offer letter. The offer letter did inform employees that they were to be considered at will employees, that they would no longer be allowed to retain health and welfare, and pension benefits as pay, but that it would be deposited into their 401(k) plans. The offer letter set forth annual leave for full-time employees, but failed to disclose a full-time employee was required to work 40 hours instead of 32 hours; failed to inform them what the benefits for sick leave and annual leave would be for part time employees, failed to explain that they would no longer be getting a uniform allowance, and that they would no longer be paid for their 30 minute lunch break. Differences which could have been easily gleaned by Paragon from Knight's CBA. Moreover, the offer letter misstated the wages, health and welfare, and pension benefits Paragon was obligated to provide thereby creating a lot of questions amongst employees, and leading to confusion as to what Paragon was actually offering due to vague assurances made by Waddell on June 29 that Paragon would honor certain aspects of Knight's CBA in response to the multitude of employee questions raised on June 29, in response to Paragon's inaccurate offer letter. Any confusing engendered by Paragon's misstating such basic benefits as wages, health and welfare, and pension rates in its offer letter should inure to Paragon and not the employees. This does not appear to be the type of timely notice of a reduction in wages and benefits to employees for informed choices that the court was contemplating in *Machinists v. NLRB,* 595 F.2d 664, 674–676 (D.C. Cir. 1978).

The predecessor contract reveals as of September 2013, someone classified as a guard was receiving $26.80 per hour; a $.65 hourly uniform allowance; and $6.00 per hour for health and welfare; and $1.19 per hour pension each of which they had the opportunity to opt to receive as directly paid to them as part of their paycheck. Based on 40 hours total their gross pay came to $1072 pay; $26 uniform allowance; $240 health and welfare; and $47.60 pension for the potential of receiving $1385.60 gross pay for a 40 hour week. Following Respondent's takeover this same

[17] See, *Paragon Systems, Inc.,* 362 NLRB No. 182 (2015), where Paragon was recently found to have violated the Act by its discharge of three employees due to their union activities.

employee lost their 30 minute paid lunch break equivalent to a loss of 2.5 hours of pay per week, lost the option of retaining their health and welfare and pension as part of their pay check and lost their uniform allowance allowing them only $1005 gross pay based on a 40 hour week. Thus, Respondent effectively reduced their option of gross weekly pay by $380.60 per week, or a cut of 27% in gross pay. The Respondent did this by bypassing the Union; and dribbling out information to the employees in an ambiguous and incomplete fashion. While Respondent was required to contribute the health and welfare money and pension to a designated 401(k) for each employee depending on the employees circumstances as per health insurance, there was no showing if there was any vesting requirement for the 401(k) contributions; or what penalties the employees would have to overcome to get access to the money. Moreover, this was an immediate hit to the employees available gross income.

It can be argued that the employee no longer had to accrue dry cleaning expenses for wash and wear uniforms. On the other hand, this assumes the employees had free access to a washer/dryer on their premises. Rather, they may still have had cleaning costs for which they were no longer compensated as well as time for cleaning the uniforms. They could have also have found ways to dry clean the uniforms without spending the whole prior allowance. Regardless, their disposable gross income was substantially reduced when Respondents took over based on ambiguous and piece meal information given to the employees.

In sum, I find Respondent became a perfectly clear successors under *Spruce Up,* through its early June memo announcing the June 29 job fair requesting the predecessor employees to apply, that they fill out an online application, and bring certain enumerated employment related documents to said job fair. I find, at the same time, Respondent failed to timely inform the applicants their wages and benefits would change. Thus, by thereafter failing to reach out and consult with the Union as to the substantial changes in wages and benefits Respondent intended to implement, and by providing piecemeal information directly to the employees about those changes the Respondent has engaged in unilateral changes and bypassed and undermined the Union in violation of Section 8(a)(5) and (1) of the Act.

2. The General Counsel's request that the Board reverse *Spruce Up*

The General Counsel contends the Board's decision in *Spruce Up Corp.,* 209 NLRB 194, 195 (1974), enfd. 529 F.2d 516 (4th Cir. 1975), should be overturned as it is inconsistent with the language in the Court's decision in *NLRB v. Burns Security Services,* 406 U.S. 272, 294–295 (1972). The General Counsel requests that I issue an order urging the Board to revisit and overturn *Spruce Up*, and that Respondent be found to be "perfectly clear" successor as contemplated by *Burns* because the evidence establishes Respondent intended to both retain the predecessor's employees and was required to offer them employment. It is argued Respondent planned to retain the predecessors' work force and thus it should be found to be "perfectly clear" successor as defined by the Court in *Burns*. It is contended Respondent's bargaining obligation attached upon determining it would enter the service contract and rely predominantly on their predecessors' work force to meet its staffing needs, due to its obligation to offer incumbent employees a right of first refusal under Executive Order 13495. It is contended that, at that point, Respondent was obligated to notify the Union of its intention to change working conditions, and thereafter give the Union an opportunity to bargain. It is asserted that because Respondent intended to hire predecessor's work force in compliance with the Executive Order it is a "perfectly clear" successor under *Burns* and violated section 8(a)(5) and (1) of the Act by failing to consult with the Union before fixing initial terms.

The General Counsel has as early as 2003 recommended the Board reverse its *Spruce Up* holding as reflected in *Elf Atochem North America, Inc.,* 339 NLRB 796, 803 (2003). The Board elected not to address the arguments made at that time. It appears the Board may now want to address the General Counsel's arguments because the disagreement between the two branches of the Agency, as it did here, helped to foster this litigation because the parties did not have clear guidelines with which to reach a resolution of their dispute. In *Elf Atochem North America, Inc.,* it was noted at 803 that the General Counsel asserted the Board should reverse *Spruce Up* and find an obligation to bargain exists over initial terms of employment whenever a successor plans to retain the existing workforce without regard to whether changes in employment conditions are contemplated or when they are announced. The General Counsel there cited *NLRB v. Advanced Stretchforming, Inc.,* 208 F.3d 801, 807–811 (9th Cir. 2000); Chairman Gould's concurring opinion in *Canteen Co.,* 317 NLRB 1052, 1054–1055 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), and the dissenting opinions of Board Members Fanning and Penello in the *Spruce Up* decision as support for the position that the case be reversed.

I find it unnecessary to recommend to the Board that *Spruce Up* be reversed as the General Counsel requests. This is a policy matter reserved to the Board. I will, however, provide the Board with an analysis of existing case law to the extent it might prove useful.[18] Some 13 years after the Board's *Spruce Up* decision, in *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 39–40 (1987), the Court stated:

> During a transition between employers, a union is in a peculiarly vulnerable position. It has no formal and established bargaining relationship with the new employer, is uncertain about the new employer's plans, and cannot be sure if or when the new employer must bargain with it. While being concerned with the future of its members with the new employer, the union also must protect whatever rights still exist for its members

[18] I recently provided a similar analysis in another case involving this Respondent. See, *American Eagle Protective Services Corp. and Paragon Systems, Inc., Joint Employers,* JD-55–15 (Sept. 22, 2015). I in large part repeat it here because the same issue is raised, and to allow clarity to the extent a party desires to file exceptions to; and/or agree with my analysis as it relates to the current case. I am aware that recently in *GVS Properties, LLC,* 362 NLRB No. 194 (2015), the Board cited the *Spruce Up* decision with approval. However, that case does not appear to include, as here, a contention by the General Counsel that *Spruce Up* be reversed.

under the collective-bargaining agreement with the predecessor employer.[FN6] Accordingly, during this unsettling transition period, the union needs the presumptions of majority status to which it is entitled to safeguard its members' rights and to develop a relationship with the successor.

The position of the employees also supports the application of the presumptions in the successorship situation. If the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a union is subject to the vagaries of an enterprise's transformation. This feeling is not conducive to industrial peace. In addition, after being hired by a new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it.[7] Without the presumptions of majority support and with the wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and of exploiting the employees' hesitant attitude towards the union to eliminate its continuing presence.

The Board and courts have also long held that by dealing directly with bargaining unit employees an employer unlawfully bypasses a union and in doing so undermines its representation status in the bargaining unit. See *Medo Photo Supply Co. v NLRB,* 321 U.S. 678, 683 (1944); *Georgia Power Co.,* 342 NLRB 199 (2004), enfd. 427 F.3d 1354 (11th Cir. 2005); and *Ken's Building Supplies,* 142 NLRB 235 (1963), enfd. 333 F.2d 84 (6th Cir. 1964). In *Medo Photo Supply Co. v. NLRB,* supra, at 683–685, the Court stated:

> The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see s 9(a) of the Act, 29 U.S.C. s 159(a), 29 U.S.C.A. s 159(a), it exacts 'the negative duty to treat with no other.' *National Labor Relations Board v. Jones & Laughlin*, 301 U.S. 1, 44, 57 S.Ct. 615, 628, 81 L.Ed. 893, 108 A.L.R. 1352; and see *Virginian Railway Co. v. System Federation*, 300 U.S. 515, 548, 549, 57 S.Ct. 592, 599, 600, 81 L.Ed. 789. Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages, violated s 8(1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.
>
> That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a majority, with respect to wages, hours and working conditions was recognized by this Court in *J. I. Case Co. v. Labor Board*, 321 U.S. 332, 64 S.Ct. 576; cf. Order of *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 64 S.Ct. 582; see also *National Licorice Co. v. Labor Board*, 309 U.S. 350, 359-361, 60 S.Ct. 569, 575, 576, 84 L.Ed. 799. The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by s 7 and a violation of s 8(1) of the Act. 2 There is no necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, if at all, or the formalities, if any, necessary for such a revocation. Compare National Labor Relations Board v. Century Oxford Mfg. Co., 2 Cir., 140 F.2d 541. But orderly collective bargaining requires that the employer be not permitted to go behind the designated representatives, in order to bargain with the employees themselves, prior to such a revocation.

In *Fall River Dyeing & Finishing Corp. v. NLRB,* supra at 42, the Court stated the following pertaining to Board action in successorship cases:

> We turn now to the three rules, as well as to their application to the facts of this case, that the Board has adopted for the successorship situation. The Board, of course, is given considerable authority to interpret the provisions of the NLRA. See NLRB v. Financial Institution Employees, 475 U.S. 192, 202, 106 S.Ct. 1007, 1012, 89 L.Ed.2d 151 (1986). If the Board adopts a rule that is rational and consistent with the Act, see ibid., then the rule is entitled to deference from the courts. Moreover, if the Board's application of such a rational rule is supported by substantial evidence on the record, courts should enforce the Board's order. See Beth Israel Hospital v. NLRB, 437 U.S. 483, 501, 98 S.Ct. 2463, 2473, 57 L.Ed.2d 370 (1978); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). These principles also guide our review of the Board's action in a successorship case. See, e.g., *Golden State Bottling Co. v. NLRB*, 414 U.S., at 181, 94 S.Ct., at 423.

As well documented in this decision, and in many others, in *NLRB v. Burns Security Services*, 406 US 272, 281–282 (1972), the Court stated "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."

In *Spruce Up Corporation,* supra at 195, the Board majority stated:

> Although, at the February meeting, Fowler expressed a general willingness to hire the barbers employed by the former employer, he at the same time indicated that he was

going to be paying different commission rates. Fowler thereby made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend upon their willingness to accept those terms. When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him-a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.

We concede that the precise meaning and application of the Court's caveat is not easy to discern. But any interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*. For an employer desirous of availing himself of the *Burns* right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent. We do not wish-nor do we believe the Court wished-to discourage continuity in employment relationships for such legalistic and artificial considerations. We believe the caveat in *Burns,* therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment[7] or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

The principles set forth by the majority in *Spruce Up* do not translate easily to the circumstances here, which could not have been foreseen by the majority at the time *Spruce Up* issued. First, the respondent in *Spruce Up* informed the union there on February 6, that "all the barbers who are working will work." However, the union was also informed at that time what the respondent planned to pay the barbers. The new commission rates were unsatisfactory to the many of the barbers leading to a strike. Thus, during the first meeting the employer clearly indicated it was altering a core term of employment; and it let the union know the new rate. It did not make the type of ambiguous statement the progeny of *Spruce Up* has morphed into as sufficient to deprive employees bargaining rights such as "at will"; or the statements put forth here such as we reserve the right to change working conditions without specifying the change, or even that there definitely would be a change.

Secondly, the Board majority's concern that to retain the right to set initial conditions an employer would have to "refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms," is inapplicable to the current category of employees, because the Executive Order gives them the right of first refusal to their current positions so whether the Respondent comments favorably about their retention or not has nothing to do with the continuity of their employment relationship. Thus, the underpinning of the majority of the *Spruce Up* rationale is not applicable here. It surely, cannot outweigh the fact as enunciated by the Court that failure to recognize a union during a successorship transition serves to undermine the union; which is further compounded when while stripping the employees of representation during this transition period, the successor employer is encouraged to engage in direct dealing with those employees, although it plans to hire, or is required to hire those employees thereby subsequently being required to recognize and bargain with the union. See the Courts pronouncements in *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 39–40, (1987); *Medo Photo Supply Co. v. NLRB,* supra, at 683–685; and *Burns* itself stating, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." The Court added no qualification to that requirement, and even in circumstances when a successor employer is forthright in detailing early on its plans to alter the predecessor's benefits, its discussing those planned changes with the union in place with a give and take may in fact help it to maintain its plans to keep the predecessors staff through the ameliorative effects of collective bargaining. As detailed by the dissent in *Spruce Up* such a process does not prevent an employer from bargaining to a lawful impasse to place its initial terms in effect, but the employees will be given a fair option of knowing the specifics of the employer's offer in advance, and be more secure in the fact that they have not been stripped of union representation in the process.

With respect to this class of government contract employers they are required to set wages and benefits in part based on the predecessor's CBA under the SCA; and give a right of first refusal to those employees under the Executive Order. As set forth above, the main concern of the *Spruce Up* majority that requiring successors to bargain during the transition period when their plans entail hiring a majority of the predecessor's, may make them not comment favorably about those employees hiring prospects is not relevant as the employees here are already assured a job offer. Moreover, the current *Spruce Up* standard potentially strips away bargaining rights for large groups of employees during a sensitive period for a union as well as those employees, as the evidence reveals that Respondent is a nationwide employer. In this instance, the single contract with FEMA involved

guards employed at multiple buildings and those within the bargaining unit involved a fairly significant number of bargaining unit employees. Baker's testimony revealed Respondent's operations are in 42 of the 50 states in the United States and many of the territories including Saipan, American Samoa and Guam. Baker testified Respondent has taken over more than 50 contracts since he arrived there in 2008. Baker testified that with the vast majority of contracts in the last 2 years more than 50 percent of the predecessor's employees have been hired by Paragon making it through the vetting process and beginning work. For the reasons set forth above, the underpinnings of the majority's rationale in *Spruce Up* do not appear to apply to this group of employers; and there appears no basis to undermine the Union here; and in similar circumstances to strip employees of their right representation when the successor is required proffer them an offer of employment.

However, the *Spruce Up* majority's concerns also can be questioned concerning employers in general. The Board majority surmised that employers who might want to preserve their *Burns* right to set initial terms would "have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms." This conclusion seems to be somewhat undermined by the fact if it is in the employer's interest to keep predecessors work force in tact due to their skills, training, expertise, knowledge of the operation, client goodwill, lack of availability of adequate substitutes, time targets in resuming or maintaining operations, or any number of a variety of factors that would come into play in such a decision it would appear the employer would have to let the employees know about it sooner than later to retain their services. The *Spruce Up* majority also went on to state, "And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent." However, the failure to offer predecessor employees employment to avoid a statutory bargaining obligation is a violation of Section 8(a)(3) and (1) of the Act. It seems to be a slender reed to eviscerate employees important representation rights because an employer may be tempted to violate the Act in another fashion. This can be construed as giving an employer a pass on its obligations under Section 8(a)(5); so it will not be tempted to violate Section 8(a)(3) of the Act. The Board is capable of upholding the rights incorporated in both sections of the Act; does not have to sacrifice one at the expense of the other; and it is likely that the vast majority of employers will voluntarily comply if those rights are clearly delineated in cases of this context.

Member Fanning took the view in his dissent in *Spruce Up* that, "The fact that some employees may refuse the offer of employment has nothing to do with the 'plans' or intent of the offering employer." It was stated, "Nor can there be any economic injury to the successor in bargaining in good faith prior to the commencement of operations, for, assuming good-faith bargaining on his part, if the union cannot persuade him that other terms are more equitable, he is perfectly free to impose those terms as the opening terms and conditions of employment upon the commencement of operations." It was pointed out, "The majority's contrary construction of this aspect of the *Burns* decision leads to the anomalous, if not absurd, result that a bargaining obligation over the establishment of the successor's initial terms and conditions of employment arises when the successor plans to retain the former employees at the terms their union had already established through collective bargaining with the predecessor employer but not when he plans to retain them at terms different from those previously established. The majority would bring to bear 'the mediatory influence of negotiation'[FN38] where there is no controversy, but deny its appropriate use where there is controversy. They thus turn the Act on its head, and to no useful end." *Spruce Up,* supra at 205-206.

Similarly, Member Penello pointed out that in *Burns* "The Court there said nothing about a conditional intent to hire." In agreement with Member Fanning, he stated, "The majority are attempting to revise substantially what the Court said, for their view would, in effect, abrogate the exception, as the only case when a violation would occur under their test would be the unlikely situation where a successor says he will continue the employees under the exact terms and conditions as existed before the takeover. If he says that he 'plans' to alter the status quo in any way, while at the same time indicating a desire to retain the old employees, they would find this amounts to a conditional intent to hire. I cannot accept that the Supreme Court would announce a rule of law that is so restrictive as to amount to a nullity." It was stated as to the successor's obligation to consult with the employees bargaining representative before he fixes terms "I regard this duty as merely an obligation to refrain from dealing with the unit employees individually concerning their future working conditions until it has notified the union and bargained to an impasse. Having thus negotiated with the union, the successor is then free to fix his terms whether the union agrees or not. In my view this is not too heavy a burden to put on any employer in order to protect the employees' Section 7 rights 'to bargain collectively through representatives of their own choosing' with respect to matters affecting the employees' interests." Id. 207-208.

In *Canteen Co.* supra at 1054–1055, Chairman Gould stated, in a concurring opinion that "I write separately, however, to express my opinion that the *Spruce Up* standard represents an unduly restrictive reading of the Supreme Court's definition of circumstances in which a successor employer must bargain about initial terms and conditions of employment." The chairman stated, "I question the validity of *Spruce Up* and believe that it grafts on an additional requirement for finding a 'perfectly clear' successor which is neither warranted nor intended by the Supreme Court in *Burns*. The Supreme Court stated that the test was only whether 'the new employer plans to retain all of the employees in the unit' for the new employer to be a 'perfectly clear' successor." The Chairman agreed with Member Fanning and Penello's prior dissents, stating:

The fact is that in many, if not most, business rearrangements, the successor employer perceives a need for change or greater flexibility in the employment relationship. This is the essential dynamic involved in the instant case as well as countless others. To eliminate instances where employers express an intent to provide changed employment conditions from the obligation to negotiate under the "perfectly clear" standard announced in *Burns*

would both render the holding on this point meaningless and also disregard the careful balance between competing interests articulated by the Court in both *Burns* and *Fall River Dyeing*.

In *Machinists v. NLRB,* 595 F.2d 664, 674–675 (D.C. Cir. 1978), the court similarly stated pertaining to the effect of the Board majority's *Spruce Up* doctrine that "To be sure, in view of the substantial harmony existent in the parties' positions, only minor adjustments in initial terms may then remain to be negotiated, and it must be acknowledged that compulsory bargaining usually yields greater returns when labor-management differences are of more appreciable magnitude." Thus, the court acknowledged the limited nature of the bargaining remaining under *Spruce Up* decision as pointed out by Members Fanning, Penello; and Chairman Gould. The court, however, went on to state in affirming the Board majority's *Spruce Up* analysis that in basic fairness to employees that unless incumbent employees "are apprised promptly of impending reductions in wages or benefits, they may well forego the reshaping of personal affairs that necessarily would have occurred but for anticipation that successor conditions will be comparable to those in force."

Here, the executive order required Respondent to accord incumbents first refusal for their positions; the SCA required the Respondent be presented with the predecessor's CBA and for Respondent to analyze that CBA to make sure it complied with the SCA in according the incumbent employees lawfully required wages and benefits. In early June a job fair notice was posted announcing a June 29 job fair off the work site to be conducted by Paragon. As announced in the early June job fair memo, the employees who elected to attend the June 29 job fair were required to fill out an on line application in advance of the job fair, which stated they were to be hired as employees at will, and that Paragon retained the right to change existing terms and conditions of employment. They were not told that Paragon actually intended to make changes to core terms of employment, or if so, what those changes would be. They were told to bring a substantial amount of documentation with them to the job fair in the job fair announcement, and that they would have to meet certain employment related requirements, most of which they had met to be hired and retain employment with the predecessor contractor. For those who attended the June 29 job fair, they were given a contingent offer letter, which indicated they would lose the ability to retain health and welfare and pension contributions as a form of wages; but they were not told specifically that they would no longer be paid for their 30 minute lunch break, or that they would lose their uniform allowance, or that there would be a requirement that they work 40 hours a week to be considered a full-time employee, instead of 32 as had been the then current requirement. Moreover, their wage rates, health and welfare rates, and pension rates were misstated in the offer letter leading confusion as to its terms by the recipients. As I have found above, information continued to be presented to them thereafter in a piecemeal fashion concerning substantive wage and benefit changes some of it being gleaned after they started their new jobs.

It is likely, that anyone reading this decision, if they are changing jobs, would want to have a clear presentation from their prospective employer specifically what their new wages and fringe benefits would be, to make a reasoned decision with their families and in a timely enough fashion to preserve their options of seeking alternative employment if the new wage and benefit package proved unsatisfactory. Here, the employees were instead presented with legal constructs, for which legal minds debate the significance, and then siphoned out information in a manner in which the Respondent determined would arguably meet the Board's standards in order to dilute the effect of Respondent's planned substantial changes and undercut the ability of the employees to seek alternate employment. At the same time the employees were stripped of union representation during this transition period.

I would note that in *Burns,* the Court stated, "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." The affirmative duty to consult was placed on the employer, for it is the employer that knows its plans as to employee retention and changes of benefits. Here, there was no demand by the Union to bargain over the initial terms of employment prior to Respondent beginning operations. However, the Respondent has not raised lack of such a demand as a defense in their answer, at the trial, or in their post-hearing brief. Had it been raised, I would have recommended its rejection, because the Court's pronouncement places an affirmative duty on the employer to consult with the union. Along these lines, this is similar to direct dealing when an employer unlawfully by passes a union concerning changes to terms of employment and deals directly with employees. It appears, under the Court's intent under *Burns* a perfectly clear successor would be required to inform the union specifically what changes in the current benefits it intends to make, in a timely fashion, and then bargain with the union to impasse before implementing those changes. Under the current *Spruce Up* rationale when employers intend or are required to hire the predecessor's work force, employees can be both denied union representation at a vulnerable period, and as well of the specifics of their new employment arrangement so they cannot make informed judgments as to their future. It would seem that both of these ends would serve to undermine a sitting union in the eyes of employees, and the bargaining process in general.

CONCLUSIONS OF LAW

1. Respondent, Paragon Systems, Inc. (Paragon) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The National Association of Special Police and Security Officers (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the following described unit has been an appropriate unit for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time Protective Service Officers employed by the Employer at the Federal Emergency Management Agency, 500 C Street, SW and 1201 Maryland Avenue, SW, Washington, DC; excluding temporary personnel as defined in Section 1.4 of the collective-bargaining agreement, of-

fice clericals, managerial personnel, project managers, supervisors as defined by the National Labor Relations Act, and all other personnel including sergeants, lieutenants, captains, site managers, officers and directors of the Employer, assistant project managers, confidential employees, and non-guard employees.

4. At all material times, the Union has been, and is now, the exclusive representative for the employees in the bargaining unit described above in paragraph 3 (the unit employees) for the purposes of collective-bargaining within the meaning of Section 9(a) of the Act.

5. Respondent, a perfectly clear successor employer, during the period of September 1, 2013 through August 14, 2014, violated Section 8(a)(5) and (1) of the Act by failing to follow certain terms and conditions of employment and related past practices set forth in the collective-bargaining agreement between Knight Protective Services, Inc. and the Union for the unit employees, by unilaterally changing the following terms and conditions of employment without providing the Union with notice and an opportunity to bargain: (a) eliminating a paid 30-minute employee lunch break; (b) eliminating an hourly uniform allowance; (c) redefining the threshold for full-time employment status from 32 hours per week to 40 hours per week; (d) discontinuing the employee option to receive the hourly health and welfare benefit as a wage in the employee's paycheck; and (e) discontinuing the employee option to receive the pension benefit as a wage in the employee's paycheck.

6. The unfair labor practices described above constitute unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has engaged in conduct violating Section 8(a)(5) and (1) of the Act, it is ordered to cease and desist therefrom, and to take the following affirmative action deemed necessary to effectuate the policies of the Act.

Respondent is ordered to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit found here to be appropriate. The parties voluntarily reached a new collective-bargaining agreement effective August 15, 2014. Thus, I find Respondent liable to employees and employees should be made whole for losses resulting from the unilateral changes found here for the period September 1, 2013 through August 14, 2014, the day before the effective date of the new CBA. See *Elf Atochem, Inc.,* 339 NLRB 796, 796 fn. 4 (2003). Since the parties reached a new collective-bargaining agreement, the General Counsel is not seeking a remedy where the Respondent is required to rescind any of the unilateral changes. Thus, employees affected by Respondent's unilateral changes, should be made whole for losses incurred during the period of September 1, 2013 through and including August 14, 2014, as a result of those unlawful changes, and Respondent should be ordered to make unit employees whole for such losses plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall then, for each affected employee, file a report with the Social Security Administration allocating backpay to the appropriate calendar quarter, and shall compensate each affected employee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award covering periods for longer than one year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Included in this recommended remedy is the requirement that, upon request of the Union on behalf of any particular affected employees, employees shall receive, as a lump-sum payment, the total amount of health and welfare contributions and/or pension contributions made on the employees' behalf by Respondent to each employee's 401(k) account between September 1, 2013 through and including August 14, 2014. Respondent shall bear all costs, fees, and tax consequences for withdrawal of said monies from employees' 401(k) accounts.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

It is hereby ordered that Respondent Paragon Systems, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with The National Association of Special Police and Security Officers (the Union) concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

All full-time and regular part-time Protective Service Officers employed by the Employer at the Federal Emergency Management Agency, 500 C Street, SW and 1201 Maryland Avenue, SW, Washington, DC; excluding temporary personnel as defined in Section 1.4 of the collective-bargaining agreement, office clericals, managerial personnel, project managers, supervisors as defined by the National Labor Relations Act, and all other personnel including sergeants, lieutenants, captains, site managers, officers and directors of the Employer, assistant project managers, confidential employees, and non-guard employees.

(b) Unilaterally changing terms and conditions of employment established by the predecessor employer's collective-bargaining agreement and practices related thereto in effect during the period of October 1, 2012 through September 30, 2015.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

with the Union as the exclusive representative of employees in the above-described unit.

(b) On the request of the Union on behalf of any or all affected employees, pay the employees, as a lump-sum payment, the total amount of health and welfare and/or pension contributions made on the employees' behalf by Respondent to the employee's 401(k) account between and including September 1, 2013 and August 14, 2014. Respondent shall pay all costs, fees, and tax consequences associated with the withdrawal of these monies from employees' 401(k) accounts.

(c) Make employees, in the above-described unit, whole for any losses they may have suffered as a result of the unilateral changes in their terms and conditions of employment during the period from September 1, 2013 and through and including August 14, 2014, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their operations 500 C Street, SW and 1201 Maryland Avenue, SW, Washington, D.C. copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent goes out of business or is displaced as the security guard contractor or subcontractor at the facilities involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former bargaining unit employees employed by the Respondent at any time since September 1, 2013.

(f) Notify the Regional Director, in writing, within 20 days from the date of this Order what steps Respondents have taken to comply.

Dated, Washington, D.C. September 30, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose a representative to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with The National Association of Special Police and Security Officers (the Union) as the exclusive bargaining representatives of employees in the following unit:

> All full-time and regular part-time Protective Service Officers employed by the Employer at the Federal Emergency Management Agency, 500 C Street, SW and 1201 Maryland Avenue, SW, Washington, DC; excluding temporary personnel as defined in Section 1.4 of the collective-bargaining agreement, office clericals, managerial personnel, project managers, supervisors as defined by the National Labor Relations Act, and all other personnel including sergeants, lieutenants, captains, site managers, officers and directors of the Employer, assistant project managers, confidential employees, and non-guard employees.

WE WILL NOT unilaterally change terms and conditions of employment established by the collective-bargaining agreement and practices in effect related to that agreement between the Union and our predecessor.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive bargaining representative of the above-described bargaining unit.

WE WILL, make whole employees in the above-described unit for any losses suffered between September 1, 2013 and through and including August 14, 2014, as a result of our unilateral changes in their terms and conditions of employment, plus interest, including our during this time period: (a) eliminating a paid 30-minute employee lunchbreak; (b) eliminating the hourly uniform allowance; (c) redefining the threshold for full-time employment status from 32 hours per week to 40 hours per week; (d) discontinuing the employee option to receive the hourly health and welfare benefit as a wage in the employee's paycheck; and (e) discontinuing the employee option to receive the pension benefit as a wage in the employee's paycheck.

PARAGON SYSTEMS, INC.

The Administrative Law Judge's decision can be found at

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

www.nlrb.gov/case/05–CA–127523 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.